82-1398

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

M/V POLLUX, Her Engines, Tackle, Apparel, Etc., *In Rem* and NEGOCIOS DEL MAR, S.A.,
Petitioner

v.

GOODPASTURE, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1.

Whether Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims is constitutional under the due process clause of the Fifth Amendment in the absence of a specific provision guaranteeing the vessel owner a pre-seizure hearing or notice of and a prompt post-seizure hearing to determine if Plaintiff has sufficient evidence to justify the seizure of a vessel.

2.

Whether an emergency appeal from the District Court's Findings of Fact and Conclusions of Law after a Rule C post-seizure hearing can establish the liabilities of the parties without a trial of the liability issues on the merits in accordance with constitutional due process when (1) the post-seizure hearing was limited to the issue of whether Plaintiff had sufficient evidence to justify the seizure of the vessel under Rule C, and (2) Petitioner was not notified that the hearing was to establish the liabilities of the parties; Petitioner was prevented from presenting evidence on the liability issues in support of its allegations in its Answer, Third Party Complaint against the cargo *in rem*, and Counterclaim against Goodpasture; and the decision was not based only on the evidence admitted and considered by the District Court in the post-seizure hearing.

3.

Whether the decision of the Court of Appeals on an emergency interlocutory appeal from a post-seizure hearing establishes the law of the case and precludes the District Court on remand from determining the liabilities of the parties in a trial on the merits in connection with

allegations and issues specifically not in issue at the post-seizure hearing.

4.

Whether the Court of Appeals' conclusion of conversion can be sustained when (1) the alleged acts of conversion occurred when the cargo was in the possession of the Court in accordance with the Rule C seizure; and (2) when as a matter of law there was no conversion of the cargo.

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Petitioner certifies that the following is a complete list of all parties to the proceedings below and, additionally, all parties and persons believed to be interested in the outcome of this Petition;

1. Goodpasture, Inc.
2. Empac Grain Company.
3. M/V POLLUX.
4. Negocios Del Mar, S.A.
5. A Shipment of Wheat of 19,067.949 Metric Tons Presently Onboard the M/V POLLUX, *In Rem.*
6. Empac Cereales Argentina, S.A.
7. Property, Inc.
8. World Trade Group.

SUBJECT INDEX

LIST OF AUTHORITIES

CASES

UNITED STATES CONSTITUTION

UNITED STATES STATUTES

SUPPLEMENTAL RULES OF CERTAIN ADMIRALTY AND MARITIME CLAIMS

TEXTS

NO. _____

IN THE

Supreme Court of the United States

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M/V POLLUX, Her Engines, Tackle, Apparel, Etc., *In Rem* and NEGOCIOS DEL MAR, S.A.,
Petitioner

v.

GOODPASTURE, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on October 12, 1982.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court dated June 20, 1979, regarding the post-seizure hearing are unreported, but they are printed on page 11a of the Appendix. The opinion of the Court of Appeals for the Fifth Circuit on the emergency appeal reversing and remanding the decision of the District Court is reported at 602 F.2d 84 (5th Cir. 1979), and it is printed on page 23a of the Appendix. The ruling of the District Court dated September 17, 1979, on remand is unreported, but it is printed on page 32a of the Appendix.

The ruling of the District Court dated December 6, 1979, is unreported, but it is recorded on the Court's Docket Sheet. The ruling of the District Court dated February 27, 1980, it is unreported, but is printed on page 34a of the Appendix. The District Court's Memorandum and Order dated June 11, 1980, is unreported, but it is printed on page 37a of the Appendix. The opinion of the Court of Appeals dated October 12, 1982, is reported at 688 F.2d 1003 (5th Cir. 1982), and it is printed on page 74a of the Appendix. The Order of the Court of Appeals denying the Petition for Rehearing and the Suggestion for Rehearing En Banc dated November 22, 1982, is unreported, but it is printed on page 86a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 12, 1982. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed, and it was denied on November 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

The pertinent parts of Rule C and Rule E of the Supplemental Rules of Certain Admiralty and Maritime Claims are printed in the Appendix on page 1a.

STATEMENT OF THE CASE

This is an action instituted by Goodpasture, Inc. (hereinafter "Goodpasture") against the M/V POLLUX *in*

rem and its owner, Negocios Del Mar, S.A. (hereinafter "Petitioner" or "Negocios"), for alleged conversion of wheat cargo loaded on board the vessel by Goodpasture on April 11 and 12, 1979. Goodpasture had sold the cargo to Empac Grain Co., Inc. (hereinafter "Empac"). Empac had sold it to the government of Colombia which had set up a letter of credit payable to Empac upon presentation of proper documentation at the Central National Bank of Miami, Florida. A crucial document needed to secure payment of this letter of credit was a freight prepaid bill of lading.

Empac had also entered into a Charter Party with Negocios to carry the cargo to Colombia with standard provisions that Negocios would be paid advance charter hire (freight) at the time it presented its vessel for loading in Houston, Texas, and that Negocios would have a lien on the cargo to guarantee payment of the charter hire. When the vessel was ready to load in Houston on April 11, 1979, Negocios refused to allow Goodpasture to load it until Empac paid the advance charter hire (freight). Subsequently, on advice of its New York broker, Negocios allowed Goodpasture to load the cargo upon representations of Charterer Empac that the charter hire (freight) had been transferred from Empac's bank in Argentina to Negocios' bank in the United States.[1] Since the charter hire (freight) had not been received by Negocios' bank when the vessel completed loading, Negocios refused to issue a false freight prepaid bill of lading as demanded by Empac because the charter hire (freight) had not been paid. When Negocios declined to issue a false prepaid bill of lading, Goodpasture seized the M/V POLLUX with the cargo onboard to insure the vessel did not sail until Goodpasture had been paid for the cargo.

1. The District Court ultimately determined that such representations were fraudulent and that Empac had not transferred the funds. Appendix pages 54a and 55a.

After its seizure of the vessel with the cargo onboard on April 13, 1979, Goodpasture assembled the documentation to obtain payment under the letter of credit in the Florida bank as soon as Negocios had been paid the charter hire (freight). On April 24, 1979, the documentation presented by Goodpasture had several deficiencies, and the Florida bank refused payment. At that time, it became apparent that Empac did not have the funds to pay the advance charter hire (freight) to Negocios. Goodpasture filed a Motion to Discharge the cargo on April 26, 1979, but Goodpasture withdrew it at approximately 4:00 p.m. on the same day because Negocios agreed to sign the freight prepaid bill of lading and accept an assignment of a portion of the letter of credit.

On May 23, 1979, Goodpasture advised Negocios that the government of Colombia would not authorize payment of the letter of credit, and the cargo would have to be discharged in Houston. Negocios filed a Third Party Complaint against the cargo *in rem* and Counterclaim against Goodpasture, Inc. on May 23, 1979. Rather than litigate the issue whether Negocios had a maritime lien for its charter hire against the cargo, Goodpasture elected to post a bond to secure the release of the cargo. The Court ordered the cargo discharged from the vessel into the custody of Goodpasture on June 5, 1979, with the vessel to remain under seizure.

Being unable to post $3,500,000.00 in security as demanded by Goodpasture to release the vessel, Negocios filed a Motion to Lift the Seizure on the ground that Goodpasture did not have a maritime lien against the vessel. A preliminary hearing was conducted on May 30, 1979, to consider whether Negocios was entitled to a post-seizure hearing on the basis of constitutional due process to determine if Goodpasture had evidence to support the maritime lien asserted against the M/V POLLUX. On

June 1, 1979, the Court ruled that a post-seizure evidentiary hearing would be conducted; and, as the Court reaffirmed at the opening of the hearing on June 18, 1980, its purpose was as follows:

> ". . . This is a motion to have a hearing as to the matter of the arrest of the ship and the question as to whether or not the ship should be released from arrest or sold pursuant to the arrest." (Appendix p. 8a).

At this hearing, Goodpasture's only basis of Negocios' conversion of the cargo was Negocios' refusal to issue a freight prepaid bill of lading. The District Court correctly held such refusal did not constitute a conversion. Since no other basis of Negocios' alleged conversion was presented to or considered by the District Court at this hearing, Negocios' Motion to Lift the Seizure was granted. Goodpasture filed an emergency appeal to the Fifth Circuit which affirmed the holding that Negocios' refusal to issue a prepaid bill of lading did not constitute a conversion of the cargo; however, the emergency panel of the Court of Appeals decided that Negocios had converted the cargo by asserting a maritime lien on such cargo.[2]

The Court of Appeals decided the very issue which all parties had agreed was not an issue at the post-seizure hearing in the District Court. This issue was whether the vessel had a maritime lien on the cargo for its charter hire (freight). Goodpasture's own attorneys stated this was not an issue at the hearing on May 30, 1979:

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2. While the M/V POLLUX was in the custody of the Marshal in accordance with the Rule C seizure, Negocios could not convert the cargo by refusing to let it be discharged as the District Court could order it discharged at any time. After loading of the cargo by Goodpasture on April 12, 1979, and prior to the seizure on April 13, 1979, neither Goodpasture nor Empac demanded the cargo be discharged. On remand, the District Court could not determine the acts constituting conversion, but the District Court determined it was bound to uphold the Court of Appeals' finding of conversion.

> "MR. McDANIEL (Goodpasture's attorney): I think we are far afield. We are now trying to resolve the issue of whether Mr. Kuykendall's client has a lien against the cargo. I thought this was a motion to lift the arrest and seizure of the vessel.
>
> MR. KUYKENDALL (Negocios' attorney): I agree, Your Honor. An argument concerning liens is irrelevant." (Appendix, page 7a).

Also, the Order of the Court dated June 5, 1979, stated that this issue was reserved for determination at a later date. In addition, the Findings of Fact and Conclusions of Law dated June 20, 1979, after the post-seizure hearing, acknowledged that this issue had been reserved for determination at a later date.

Upon remand from the emergency appeal, the District Court initially set the case for trial on all issues of liability and damages; however, the District Court reversed its ruling and set the case for a Hearing to Show Cause Why Judgment Should Not be Entered in Favor of Goodpasture. The District Court ruled the law of the case precluded it from considering the liability issues on remand even though the Court acknowledged that such liability issues had not been tried at the post-seizure hearing. After the Show Cause Hearing, the District Court entered Judgment in favor of Goodpasture against the M/V POLLUX and Negocios because it was precluded from determining the liability issues by the "letter and spirit of the Fifth Circuit opinion." The Court of Appeals refused to consider Negocios' argument regarding constitutional due process on the basis that the prior opinion of the Fifth Circuit established the law of the case.

REASONS FOR GRANTING WRIT

There are three compelling important reasons why a review on Writ of Certiorari should be granted in this case, as follows:

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1. The decision of the Court of Appeals determining that an emergency appeal from a constitutionally required post-seizure hearing establishes the liability of the parties without a trial on the merits raises an extremely important issue of the constitutionality of Rule C and the constitutional application under the due process clause of the Fifth Amendment of Rule C and Rule E of the Supplemental Rules for Certain Admiralty and Maritime Claims; and such decision is in direct conflict with numerous prior decisions of this Court regarding constitutional due process.
2. The decision of the Court of Appeals improperly applied the law of the case doctrine to a decision on a post-seizure hearing instead of a Final Judgment, and such application of this legal doctrine is in direct conflict with prior decisions of this Court.
3. The maritime cause of action for conversion created by the United States Court of Appeals for the Fifth Circuit cannot be sustained when (1) the acts of conversion occurred while the cargo was in the possession of the Court in accordance with a Rule C seizure; and (2) as a matter of law there was no conversion of the cargo.

REASON NO. 1:

The constitutionality and due process application of Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims is extremely important in the proper administration of justice in connection with the voluminous admiralty and maritime cases filed in the District Courts of the United States. Moreover, this Court has a special interest in examining the constitutionality of this Rule C seizure because of the Court's role in the adoption of Rule C and the recognition by the lower Courts that Rule C does not meet the constitutional due process guidelines formulated by this Court since the adoption of the

Supplemental Rules in 1966.[3] Specifically, since Rule C does not require a pre-seizure or prompt post-seizure hearing when a vessel has been seized, Rule C is in direct conflict with the constitutional due process guidelines established by this Court, as follows:

1. State statutes which did not provide for either a pre-seizure or post-seizure notice and a hearing with respect to property seized upon issuance of a writ by a court clerk were declared unconstitutional.

   a. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) (Wisconsin garnishment statute).

   b. *Bell v. Benson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) (Georgia motor vehicle safety responsibility statute).

   c. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (Florida and Pennsylvania replevin statutes).

   d. *North Georgia Finishing, Inc. v. Di-Chem*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975) (Georgia garnishment statute).

2. Louisiana sequestration statute was held constitutional only because the statute expressly provided

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3. Although the Court approved the adoption of the Supplemental Rules, the Court could not and did not attempt to pass upon the constitutionality of Rule C (or any other rule) by transmitting them to Congress in its Order Amending Federal Rules of Civil Procedure dated February 28, 1966, 383 U.S. 1031 (1966). In such Order, Justice Black made this abundantly clear as follows:

"The Amendments to the Federal Rules of Civil and Criminal Procedure today transmitted to the Congress are the work of very capable advisory committees. Those committees, not the Court, wrote the rules. Whether by this transmittal the individual members of the Court who voted to transmit the rules intended to express approval of the varied policy decisions the rules embody I am not sure. I am reasonably certain, however, that the Court's transmittal does not carry with it a decision that the amended rules are all constitutional. For such a decision would be equivalent of an advisory opinion which, I assume the Court would unanimously agree, we are without constitutional power to give. . . ." 383 U.S. at 1032.

the debtor was entitled to notice and an immediate hearing after the seizure. *Mitchell v. W. T. Grant*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974).

While this Court has not heretofore considered whether a pre-seizure or post-seizure hearing is constitutionally required under Rule C, the Courts of Appeals for the Fourth and Fifth Circuit have recently addressed this specific issue. Both Courts of Appeal recognized the failure of Rule C to meet constitutional due process requirements because it did not contain a specific provision for a pre-seizure hearing,[4] but both Courts of Appeals determined that Rule C did not require a pre-seizure hearing because of the special features of the admiralty and maritime law.[5] Nevertheless, both Courts specifically held that a prompt post-seizure hearing under Rule C is required by constitutional due process even though Rule C does not make provision for such hearing.[6] *Merchants National Bank v. Dredge GENERAL G. L. GILLESPIE*, 663 F.2d 1338 (5th Cir., December 18, 1981);[7] *Amstar*

4. "We have little doubt that rule C would be invalid if its constitutionality were to be measured solely by the principles explained in *Sniadach* and other cases on which Nova relies." *Amstar Corporation v. SS ALEXANDROS T*, 664 F.2d 904, 907 (4th Cir., November 10, 1981).

5. "The problem associated with enforcement of a maritime lien by the seizure of a vessel bear little or no resemblance to the garnishment of wages [*Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969)] or the replevin of a consumer's stove [*Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).]" 663 F.2d at 1345 (5th Cir. 1981).

6. The Court of Appeals for the Ninth Circuit has recently reached the same conclusion in holding the garnishment provisions of Supplemental Rule B constitutional if notice of and a prompt post-seizure hearing is provided. *Polar Shipping, Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir., June 30, 1982).

7. Former Chief Judge John R. Brown held that "Local Rule 21 and the inherent power of the admiralty guaranteed to a vessel-owner a prompt post-seizure hearing in which he can attack the verified complaint, the arrest, the security demanded, or any other alleged

Corporation v. SS ALEXANDROS T, 664 F.2d 904 (4th Cir., November 10, 1981).[8]

This Petition for Writ of Certiorari presents a classic case in which Negocios was denied, not just a fair trial, but any trial at all, on all issues of liability between Goodpasture and Negocios. Obviously, if Rule C had specified the minimum constitutionally required procedure for a pre-seizure or prompt post-seizure hearing and an interlocutory appeal, the emergency panel of the Fifth Circuit could have only determined whether Goodpasture had presented sufficient evidence to justify the continued seizure or sale of the vessel pending a trial on the merits. Likewise, a provision in Rule C would have avoided the determination on remand by the District Court and by a different panel of Circuit Judges on the subsequent appeal that the post-seizure hearing had been a trial on the merits.

The decision of the lower Courts demonstrates categorically that Negocios was denied constitutional due process in the post-seizure hearing and emergency appeal because Negocios was not provided adequate notice of the scope and nature of the hearing, an opportunity to present evidence in support of its position, and an opinion upholding the seizure of the M/V POLLUX on the basis of the evidence introduced at the post-seizure hearing. Hence, Negocios was not accorded constitutional due process, and the decisions of the lower Courts are in direct conflict with the decisions of this Court, as follows:

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deficiency in the proceedings up to that point." 663 F.2d at 1351. Circuit Judge Tate respectfully dissented on the ground that Rule C did not meet constitutional due process requirements. In the present case, the District Court did not have a Local Rule guaranteeing the vessel owner a post-seizure hearing.

8. The decision of the Fourth Circuit is particularly significant because it held that the shipowner was "constitutionally entitled to a prompt post-arrest hearing in which plaintiff has the burden of showing probable cause for the arrest." 664 F.2d 912.

Armstrong v. Manzo, 380 U.S. 545, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965).

Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970).

The actions of the District Court on remand in determining the emergency appeal of the post-seizure hearing had resolved all liability issues between the parties and in setting the case for a hearing to Show Cause Why Judgment Should Not Be Entered in Favor of Goodpasture present a denial of due process. These actions shifted the burden of proof on the conversion issue to Negocios, a burden which denied Negocios its constitutional right to a fair trial with due process of law; and this Court's decision in *Armstrong* clearly required a trial on liability be granted Petitioner herein, as follows:

> "Had the petitioner (Negocios) been given the timely notice which the Constitution requires, . . . (Goodpasture) as the moving part(y), would have had the burden of proving (its) . . . case as against whatever defenses the petitioner might have interposed.
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> * * *
>
> Instead, the petitioner (Negocios) was faced on his first appearance in the courtroom (on conversion unrelated to the bill of lading) with the task of overcoming an adverse decree entered by (the emergency panel) . . . based upon (no finding by the District Court). . . . As the record shows, there was placed upon the petitioner (Negocios) the burden of affirmatively showing that (it has not converted the cargo). . . . The burdens thus placed upon the petitioner (Negocios) were real, not purely theoretical. For 'it is plain that where the burden of proof lies may be decisive of the outcome.' Speiser v. Randall, 357 U.S. 513, 525, 2 L.Ed.2d 1460, 1472, 78 S.Ct. 1332. Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the

Constitution." 380 U.S. at 551. (Parenthetical expressions added)

The decisions below are also in direct conflict with this Court's decision in *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970). In analyzing the fundamental due process requirement in *Armstrong v. Manzo, supra*, regarding an opportunity to be heard "at a meaningful time and in a meaningful manner" 380 U.S. at 552, the Court sets forth due process guidelines as follows:

> "In the present context these principles require that a recipient (1) have a timely and adequate notice detailing the reasons for a proposed termination (seizure), and (2) an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." 397 U.S. at 267. (parenthetical numbers and words added)
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> * * *
>
> (3) . . . The decision maker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing. . . . To demonstrate compliance with this elementary requirement, the decision maker should state the reasons of his determination and indicate the evidence he relied on. . . ." 397 U.S. at 271. (parenthetical number added)

The minimal constitutional due process requirements established by these cases required that the District Court provide Petitioner herein the following:

1. Notice as to the claims being relied on by the seizing party (Goodpasture) to justify its seizure of the vessel;
2. A post-seizure hearing at which Goodpasture would be required to present evidence to support its claim in the Second Amended Original Complaint,

i.e., Negocios converted the cargo by failing to issue a freight prepaid bill of lading; and

3. The District Court state the reasons for his determinations solely on the legal rules and evidence adduced at the hearing.

Since Negocios was not provided these minimum due process rights, the Rule C seizure was not constitutionally applied; and the Writ of Certiorari should be granted.

1. Absence of Notice.

On June 1, 1979, the Court notified Petitioner and Respondent that a post-seizure hearing would be conducted on June 18, 1979, in accordance with the guidelines discussed at the hearing on May 30, 1979.[9] On May 30, 1979, the Court held a hearing to determine if it should grant a post-seizure hearing on the Motion to Lift the Seizure of the M/V POLLUX, and the Court notified the parties that any post-seizure hearing would only consider the question of whether Goodpasture had sufficient evidence to show it could probably succeed in the trial on the merits to justify the continued seizure and/or sale of the M/V POLLUX. Petitioner did not have notice that it would be required to place on any evidence concerning the defenses in its Answer or the allegations in the Third Party Complaint against the wheat *in rem* or the Counterclaim against Goodpasture, *in personam*. Therefore, Petitioner did not conduct discovery to obtain information and records from Goodpasture, Empac Grain Co., Inc., or Central National

9. Petitioner filed a Motion to Lift the Seizure of the M/V POLLUX and requested a post-seizure hearing. Goodpasture opposed the post-seizure hearing and demanded the vessel be sold because Rule C did not provide for a hearing. Rule E authorized the Court to sell the vessel as the Petitioner could not post the requested security.

Bank of Miami; Petitioner did not obtain any testimony from any independent witnesses regarding the custom in the grain industry concerning passage of title to the grain cargo; Petitioner did not make arrangements for one of the vessel owners, who had been in Houston during loading, to testify; and Petitioner was certainly not prepared to try the case on the merits on June 18, 1979.

The lack of notice is best demonstrated by the rulings of the District Court and the pleadings. *First,* at the conclusion of the May 30, 1979 hearing, Goodpasture's counsel specifically requested the procedural status of such hearing on the Motion to Lift the Seizure of the M/V POLLUX as follows:

> MR. SYDOW (Goodpasture's attorney): With regard to a request for a hearing, I ask what the Court's ruling is. Is it that a hearing will not be held on the merits of the Plaintiff's claim? Is this actually a motion for judgment of the pleadings?
>
> THE COURT: What I'm doing, I imagine, is giving him his due process claims as to whether or not this arrest of the vessel is done without due process of law, as a deprivation of property without due process of law. In trying to satisfy the due process requirements by having this hearing at this time." (Appendix p. 3a).

Second, on May 30, 1979, Petitioner objected to the sufficiency of Plaintiff's First Amended Original Complaint and Goodpasture received permission from the Court to file an Amended Complaint. On June 1, 1979, Goodpasture filed its Second Amended Original Complaint alleging a cause of action against the M/V POLLUX and Negocios Del Mar, S.A. as follows:

> "On or about April 12, 1979, there was delivered to the Defendants and loaded onboard the M/V POLLUX a cargo of seven hundred thousand, six hundred and twenty (700,620) bushels of number

> two hard red winter wheat, all in good order and condition. Thereafter, in derogation of their expressed and/or implied agreements and undertakings in contrary to law, Defendants did wrongfully refuse to issue bills of lading covering said cargo of the tenor previously agreed and converted said cargo of wheat to their own purposes and uses."

The Second Amended Original Complaint provided notice that the evidentiary hearing on the Motion to Lift the Seizure of the M/V POLLUX would be limited to the question of whether Goodpasture converted the wheat cargo by failing to issue bills of lading.

Third, Goodpasture did not place the District Court or Petitioner on notice that the question of whether Negocios had an *in rem* claim against the cargo would be placed in issue at the time of the hearing. In fact, at the May 30, 1979 hearing, Goodpasture acknowledged that the post-seizure hearing would not deal with the question of whether Negocios had an *in rem* right against the cargo, as follows:

> "MR. McDANIEL (Goodpasture's attorney): I think we are far afield. We are now trying to resolve the issue of whether Mr. Kuykendall's client has a lien against the cargo. I thought this was a motion to lift the arrest and seizure of the vessel.
>
> MR. KUYKENDALL (Negocios' attorney): I agree, Your Honor. An argument concerning liens is irrelevant.
>
> THE COURT: All right. I will get you a ruling by this Friday." (re a post-seizure hearing) (Appendix p. 7a)

Fourth, after the Petitioner filed a Third Party Complaint against the wheat cargo *in rem* on May 23, 1979, Goodpasture agreed to post a bond as security in accordance with Rule E and reserve its right to contest the

validity of Petitioner's *in rem* claim against the wheat cargo. Thereafter, the Court entered an Agreed Order on June 5, 1979, discharging the cargo from the M/V POLLUX and providing as follows:

> "Goodpasture reserving its right to have the Court to determine the necessity for, and the amount of, any security at a later date, and Negocios Del Mar agree that the Court make such determination as expeditiously as possible."

Also, the District Court's Findings of Fact and Conclusions of Law dated June 20, 1979, reaffirmed that Goodpasture had reserved "its right to have the Court determine necessity for and amount of security to be required" in connection with Petitioner's claim against the cargo *in rem.* (Appendix p. 16a).

Fifth, the post-seizure hearing on Petitioner's Motion to Lift the Seizure of the M/V POLLUX was called for hearing by the Court on June 18, 1979, and no issue regarding Petitioner's right against the cargo *in rem* was presented, as follows:

> "THE COURT: Goodpasture, Inc. versus the M/V POLLUX, her engines, tackle, apparel, et cetera, Empac Grain Company and Negocios Del Mar, S.A., her owners and/or operators, civil action number H-79-770. This is a motion to have a hearing as to the matter of the arrest of the ship and the question as to whether or not the ship should be released from arrest or sold pursuant to the arrest." (Appendix p. 8a)

Of course, Goodpasture could have sought a hearing to determine whether Petitioner had a maritime lien against the cargo *in rem,* but Goodpasture chose to post security in accordance with Rule E and to reserve its right for a determination of Petitioner's claim against the cargo *in rem.*

Sixth, the Findings of Fact and Conclusions of Law entered by the District Court on June 20, 1979, specifically determined that Goodpasture seized the vessel to keep Negocios from sailing without issuing a freight prepaid bill of lading.[10] Also, after reviewing all of the evidence, the District Court concluded that "Negocios refusal to sign freight prepaid bills of lading did not constitute conversion of Goodpasture's wheat cargo"[11] and such legal conclusion was not challenged or reversed by the Court of Appeals for the Fifth Circuit. On emergency appeal, the Fifth Circuit reversed on the basis that Negocios had converted the cargo by asserting a maritime lien against such cargo; however, the issue of Petitioner's *in rem* right against the cargo was not before the Court on June 18, 1979, and such issue was specifically reserved for determination at a later date in the Agreed Order dated June 5, 1979, and the Findings of Fact and Conclusions of Law dated June 20, 1979.

Seventh, the rulings of the District Court after reversal and remand by the Fifth Circuit demonstrate clearly Petitioner was not provided notice that the post-seizure hearing was a trial on the merits. On September 17, 1979, the District Court conducted a hearing with the parties to agree on a discovery schedule to provide an expedited trial in view of the fact that the M/V POLLUX was still under seizure.[12] At that time, the Court ruled that the preliminary hearing and appeal had not been a trial on the merits and that a trial on the merits would be commenced on December 4, 1979, as follows:

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10. Finding of Fact No. 20. Appendix page 15a.

11. Conclusion of Law No. 1. Appendix page 17a.

12. On October 2, 1979, security for $600,000.00 was posted in accordance with a Court order. The majority stockholders of Negocios Del Mar, S.A. could not provide this security, and they lost control of the company.

"MR. SYDOW (Goodpasture's attorney): We won't be able to agree on anything at all if the question of liability is still open.

THE COURT: Well, a trial is a trial.

MR. SYDOW: There is such things as bifurcated trials on liability and damages which is what, in effect, we have had here. We have had an appeal from the final judgment of the Court holding that we had no cause of action against Negocios Del Mar and an appellate decision saying that we do. From our view the only thing open at this point is how much our damages are.

THE COURT: I think the entire thing is going to be heard. I don't know. You are going to get a panel?

MR. SYDOW: I don't think we need one. I think we have already disposed of the liability issue.

THE COURT: I don't think so. They remanded it.

MR. SYDOW: No evidence has been presented as to the amount of damages. We can't render a judgment without an amount.

THE COURT: I would suggest that the whole case go forward before the trial court." (Appendix p. 32a-33a)

Subsequently, Goodpasture filed a Brief asserting that the opinion of the Fifth Circuit established the law of the case and precluded the District Court from determining the liability issues between Goodpasture, the M/V POLLUX and Petitioner. On December 6, 1979, the District Court reversed its ruling of September 17, 1979, cancelled the trial setting, and set the case for a hearing to Show Cause Why Judgment Should Not be Entered in Favor of Goodpasture in accordance with the decision of the Fifth Circuit.

Eighth, the ruling of the District Court at the commencement of the Show Cause Hearing confirms the June 18, 1979, post-seizure hearing was not a trial on the

merits. Petitioner reurged its position that the case should be set for trial because the constitutionally required post-seizure hearing and emergency appeal could not be a final determination of the liability issues between the parties. The District Court acknowledged that it did not call the case for a trial on the merits on June 18, 1979, and the Court only set the case for an evidentiary hearing to accord Petitioner's constitutional due process; however, the Court noted that the case was somehow transferred to a trial on the merits with a final binding determination of liability by the decision of the Court of Appeals. In this regard, Petitioner sets forth in detail the specific comments of the Distruct Court, as follows:

> "MR. KUYKENDALL: (Negocios) There is one more item that he have, and that is concerning our request that the Court reconsider its ruling in December in calling that matter for a show cause hearing and instead call the case for trial on the merits.
>
> THE COURT: Well, the problem is, I think everybody is—according to my recollection, it is a misnomer of the situation. At any rate, as to what I thought we were trying last time, but evidently your firm was also guilty of that. And perhaps by consent we did try it on the merits at that time. At any rate, I think that by this vehicle of show cause hearing which you will be able to put on the evidence that you would have put on in any event if it were a trial on the merits.
>
> MR. KUYKENDALL: As I understand, what I see it [the Court] is trying to let the defendant go forward and put on any evidence it wants to on the basic cause. But my problem is that in choosing this vehicle that the Court has shifted the burden of proof to the defendant to carry forward and show why the plaintiff shouldn't win in this case.
>
> THE COURT: I think that is somewhat foreclosed, going within the parameter set for us by the Fifth Circuit. So this is not—

MR. KUYKENDALL: At the time of the initial hearing on June 18, we could have only tried unless we agreed to try something by consent, we could only try what was called for trial by the Court.

THE COURT: In the appeal, it was called a trial on the merits. (Appendix p. 34a).

* * *

THE COURT: Anyway, in abundance of fairness, I think I am trying to allow you to have your say here, and we will take it under consideration, and of course, I think by the time it is over, perhaps both sides will appeal the ruling of this Court and then we will go on from there.

MR. KUYKENDALL: Since the Court is going forward with that, I am going to start with exhibits and assume that the previous trial exhibits should go forward. In further support of my Motion and I ask the Court to reconsider it, but I want to introduce an exhibit and call the attention of the Court to certain things as to what was really tried on the hearing to make my record before the Court to show the appellate court what was actually tried and seek a fact finding from this Court that only our Motion to lift the arrest was tried.

THE COURT: Go ahead." (Appendix p. 35a).

MR. KUYKENDALL: Also, I would like to call to the Court's attention the transcript of the previous trial, page 3, the Court's announcement. 'THE COURT: Goodpasture, Inc. versus the M/V POLLUX, her engines, tackle, apparel, et cetera, Empac Grain Company and Negocios Del Mar, S.A., her owners and operators, civil action H-79-770. This is a motion to have a hearing as to the matters of the arrest of the ship and the question as to whether or not the ship should be released from the arrest or sold pursuant to the arrest. And that's contained in the transcript.'

THE COURT: That's what I thought I was trying, but evidently it expands into something else. And on appeal it was on the merits." (Appendix p. 36a).

In addition, at another point in the Show Cause Hearing wherein Petitioner called the Court's attention to the refusal of the Court to allow Petitioner to introduce witness Williams to testify, the Court responded as follows:

> THE COURT: I think that that was my understanding at the time. But other matters interceded there, and the posture before the appellate court was apparently a trial on the merits.
>
> MR. KUYKENDALL: I can't understand how there can be a trial on the merits before the Fifth Circuit. I'm sure they can tell me how it was.
>
> THE COURT: I don't either, but there is again justice up there and they tell us what it is. And if they think it is that, I guess it is."

Finally, after the Show Cause Hearing, the District Court filed its Memorandum and Order dated June 11, 1980, and held that the hearing of June 18, 1979, was only an evidentiary hearing and not a trial on the merits, as follows:

> "Briefs were filed by the parties and a hearing was conducted on June 1, 1979 (May 30, 1979). After reviewing the issue and being of the opinion that a further evidentiary hearing concerning Plaintiff's *in rem* claim against the vessel was necessary in order for the Court to rule upon Negocios' Motion to Lift the Arrest of the vessel, a hearing was set for June 18, 1979, for the purpose of taking evidence and hearing argument concerning Plaintiff's *in rem* claim against the vessel." (Appendix p. 45a).

In conclusion, although the District Court acknowledged the issues of liability were not tried at the post-seizure hearing, the Court determined that it was precluded from considering any issues of liability between Goodpasture and Negocios because of "the letter and spirit of the Fifth Circuit's opinion." Likewise, the District Court refused to consider substantial evidence in

support of Negocios' position at the Show Cause Hearing, but which was not available at the post-seizure hearing.[13]

2. Opportunity to Introduce Evidence In Support of Its Position.

Since Goodpasture posted security and reserved the question of Negocios' right against the cargo *in rem* for determination at a later date, Negocios did not seek to develop or introduce any such evidence supporting its position. Nevertheless, as Goodpasture had contended that Negocios had allowed the M/V POLLUX to be loaded to create a lien on the cargo for the charter hire, Negocios sought to introduce testimony from Jerry Williams, Negocios' chartering broker, to show that it had not allowed the cargo to be loaded in order to create a maritime lien on the cargo. Goodpasture objected that this testimony was not material, and the District Court refused to allow Williams to testify, as follows:

> "MR. SYDOW (Goodpasture's attorney): We realize this case is being tried to the court, but none of this is really material to the issues in this hearing today.
>
> THE COURT: I don't think so either. I can't see the materiality of what their contract or their charter dispute with Empac has to do with this case—with what we are hearing today, rather.
>
> MR. KUYKENDALL (Negocios' attorney): If the plaintiffs are waiving their argument that we pulled up here to that dock in order to create a maritime

13. At the Show Cause Hearing, Negocios introduced substantial documentation from the files of Goodpasture, testimony and documentation from the bank officer of the Florida bank, documentation and testimony from representatives of Empac (Gonzales and Vatistas, foreign witnesses of the vessel owner, and a recognized grain expert to testify concerning the custom of in the industry with regard to passage of title. All this documentation and testimony was developed in discovery and it was not available at the post-seizure hearing.

lien that we knew before we pulled up there they weren't going to be paid under the charter party, there is no reason to put him up there. If that is no longer the contention in this case, I would agree with the court.

MR. SYDOW: It's simply that that's not being tried here today.

THE COURT: I don't think that's being tried here today either." (Appendix p. 8a).

Yet the entire basis of the emergency panel's decision that Negocios is liable to Goodpasture is grounded on the Fifth Circuit's decision that Negocios had no maritime lien on the cargo, an issue never presented to or considered by the District Court. At the commencement of the Show Cause Hearing on February 27, 1980, the District Court agreed that he did not understand the post-seizure hearing involved the maritime lien issue and that he was probably mistaken in refusing to allow Williams to testify:

"THE COURT: I think at that time I thought I was trying something else. At any rate, perhaps I should have let him testify." (Appendix p. 35a).

3. Opinion.

While the District Court "state(d) the reasons for his determination(s)" in the Findings of Fact and Conclusions of Law entered after the post-seizure hearing on June 20, 1979, "solely on the legal rules and evidence adduced at the hearing," as required by *Goldberg v. Kelly*, 397 U.S. at 271, the opinion of the emergency appeal panel of the Fifth Circuit did not meet such due process requirements.

First, the Fifth Circuit decided the emergency appeal on the issue of whether Negocios had a maritime lien

against the cargo, when this issue was neither noticed nor tried at the post-seizure hearing.

Second, the Fifth Circuit relied only upon the Findings of Fact of the District Court in reaching its conclusion that Negocios converted the cargo.[14] These findings detailed the events chronologically until the seizure of the M/V POLLUX by Goodpasture, on April 13, 1979, but there is neither finding nor evidence that Goodpasture made any demand for return of the cargo or that Negocios refused to return the cargo, both of which are essential elements of an action for conversion. The only findings relied upon by the Fifth Circuit to support its conversion finding were Goodpasture's demand on April 25 and Negocios' assertion of a maritime lien. Since the M/V POLLUX and its cargo were in the possession of the Marshal for the District Court in accordance with the Rule C seizure on April 13 and at all times thereafter, Negocios could not have been guilty of conversion of such cargo for acts after the date custody and control was taken by the Marshal by the seizure. In fact, in its determination of damages upon remand, the District Court noted that a literal reading of the emergency panel's opinion indicated that the Fifth Circuit had concluded that the conversion of the cargo occurred after the seizure as follows:

> "Reading this language literally, it would appear that the date on which Negocios converted the grain would coincide with the date that Negocios filed the *in rem* claim against the grain: May 23, 1979. In view of the fact, however, that the case reached the Circuit Court as a result of this Court's dismissal of the Plaintiff's complaint, filed the day after the grain was fully loaded on board the vessel, the validity of Plaintiff's claim on that date, April 13,

14. "Our statement of the facts is a paraphrase of the Court's findings." 602 F.2d 86 n.1.

> must have been the issue disposed of by the appellate court. It logically follows that in order for the Plaintiff to have a valid *in rem* claim on that date, actions by Negocios giving rise to that claim must have occurred on or before that date." (Appendix p. 62a).

Even though the District Court could not specify any act of Negocios before the seizure on April 13, 1979, in support of the Fifth Circuit's conclusion, the District Court held it was precluded from reconsidering the conversion issue by the "letter and spirit of the Fifth Circuit Court opinion." Negocios submits that such determination by the District Court cannot replace the due process right to which it was entitled—the District Court "state the reasons for his determination(s)" in its opinion solely on the legal rules and evidence adduced at the hearing. *Goldberg v. Kelly*, 397 U.S. at 271.

REASON NO. 2:

The application of the law of the case doctrine by both Courts below is directly in conflict with this Court's decision in *United States of America v. United States Smelting, Refining & Mining Company*, 339 U.S. 186, 70 S.Ct. 537, 94 L.Ed. 750 (1950). The ruling of the District Court and the Fifth Circuit that the law of the case doctrine prevented them from (1) considering Negocios' claim that it had not been accorded constitutional due process and (2) from considering the evidence supporting its contentions in its Answer, Third Party Complaint against the cargo *in rem*, and Counterclaim against Goodpasture is in direct conflict with *United States of America v. United States Smelting, Refining & Mining Company, supra.* In that case this Court specifically held that the law of the case doctrine was only to be utilized in connection with a Final Judgment, as follows:

> "We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindered rule of *res judicata*. . . . And although the latter is a uniform rule, the 'law of the case' is only a discretionary rule of practice." 339 U.S. at 199.

Similarly, as stated by Justice Holmes, the law of the case "merely expresses the practices of courts to refuse to reopen what has been decided and not a limit in its power;' and, of course, the prior decision of an Appellate Court is not binding as the "law of the case" on this Court. *Messinger v. Anderson*, 225 U.S. 436, 32 S.Ct. 739, 56 L.Ed. 1152 (1912). Therefore, the Fifth Circuit's conclusion that "we are constrained to conform to the law of the case rubric and decline further review of this claim," 688 F.2d at 1006, is a clearly unwarranted and erroneous application of the doctrine. Obviously, the Fifth Circuit failed to recognize that the post-seizure hearing and emergency appeal did not provide a trial of the liability issues on the merits, but this was a constitutionally required post-seizure hearing to determine if Goodpasture had sufficient evidence to show it could probably prevail at trial to justify the continued seizure or sale of the M/V POLLUX. This erroneous application of the law of the case doctrine graphically demonstrates the dangers inherent in trying to cure the constitutional due process defects in Rule C by resort to other procedural processes. It also graphically demonstrates the need for either (1) specific constitutional due process guidelines in Rule C regarding a pre-seizure or post-seizure hearing and an interlocutory appeal, or (2) an authoritative opinion of this Court providing for these procedures.

REASON NO. 3:

On the emergency appeal, the Fifth Circuit held that Negocios converted Goodpasture's cargo by asserting a

maritime lien against such cargo, but this conclusion is legally incorrect because (1) Negocios could not be guilty of conversion when the cargo and vessel were not in its possession but were in the possession and control of the District Court under a Rule C seizure; and (2) as a matter of law, there was no conversion of the cargo.

The emergency panel of the Fifth Circuit stated the facts it relied on to constitute conversion of the cargo by Negocios as follows:

> ". . . (1) that Negocios had no intention of releasing the wheat to Goodpasture or anyone else until the charter hire was paid. Here was no puffery or negotiating bluff but a real and manifested claim on the wheat by one in actual possession of it at clear variance with the rights of its owner, one which has been manfully maintained until this day. (2) Goodpasture indeed, only obtained discharge of the wheat by posting the very substantial security demanded by Negocios. We think these actions by Negocios were sufficiently at variance with the right to possession of the wheat by its owner, Goodpasture, to constitute conversion, . . ." 602 F.2d at 87. (parenthetical numbers added)

On remand, the District Court acknowledged the lack of any facts to show that Goodpasture demanded the return of the cargo and that Negocios refused to return such cargo prior to the seizure on April 13, 1979. The District Court also agreed with Negocios' position that it could not have converted the cargo after the seizure because the cargo was in the custody of the Court. The District Court noted the emphasis of the Fifth Circuit on the acts after the conversion, but the Court determined the written request for demand of the cargo on April 25, 1979, would not support the claim for conversion because Goodpasture "withdrew the request to have the grain discharged the following day, April 26, 1979."

The Fifth Circuit utilized the Texas law of conversion to determine the necessary elements in establishing the maritime cause for conversion in *Norris v. Bovina Feeders, Inc.*, 492 F.2d 502 (5th Cir. 1974). This case upholds the uniform principle of conversion law that "one in lawful possession of another's property may become liable for conversion on demand and refusal to deliver." *See also,* Restatement (Second) of Torts, § 237 (1966). Likewise, Negocios could not be liable for conversion of the cargo when the identity of the true owner of the cargo was in doubt. Restatement (Second) of Torts, § 299 (1966)[15] Since there was no demand or refusal to discharge the cargo, Negocios cannot be guilty of conversion by merely asserting a lien against the cargo. *Branham v. Prewitt,* 636 S.W.2d 507 (Tex. Civ. App.—San Antonio 1982), writ ref'd n.r.e., *per curiam,* 26 Tex. Sup. Ct. J. 126 (December 1, 1982). Furthermore, title to the grain cargo passed to Empac by operation of law in accordance with the Texas Uniform Commercial Code at the time the cargo was loaded onboard the vessel. *Mahon v. Stowers,* 416 U.S. 100, 40 L.Ed.2d 79, 94 S.Ct. 1626 (1974), on remand *In the*

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15. The fact that there was reasonable doubt concerning ownership of the cargo after the seizure on April 13, 1979, is clear. On April 24, 1979, Goodpasture presented an oral Motion to Discharge the Cargo, but the Court refused to discharge the cargo until Empac had an opportunity to appear and provide its position with regard to the ownership of such cargo. Immediately after this hearing, Negocios filed a Motion for Discovery for Goodpasture to produce documentation in its possession concerning the contract for the sale of the cargo between Goodpasture and Empac, and Goodpasture produced a Confirmation of Sale contract dated March 20, 1979, indicating the terms and conditions of sale. On the basis of such documentation, Empac would have been the legal owner of the cargo. *T. J. Stevenson & Co., Inc. v. 81,193 Bags of Flour,* 629 F.2d 338 (5th Cir. 1980). At the post-seizure hearing, Goodpasture refuted the Confirmation of Sale contract and relied upon an oral agreement whereby Goodpasture and Empac agreed Goodpasture would retain title to the cargo until such time it received payment under the letter of credit.

Matter of Samuels & Co., Inc., 510 F.2d 139 (5th Cir. 1975), *reh. en banc* 526 F.2d 1238 (5th Cir. 1976); *T. J. Stevenson & Co., Inc. v. 81,193 Bags of Flour*, 629 F.2d 338 (5th Cir. 1980).

This Petition should be granted as Negocios could not have converted the cargo because:

1. Goodpasture finished loading the cargo on April 12, seized the vessel on April 13 to prevent it from sailing and never demanded the return of the cargo at any time prior to the seizure on April 13, and Negocios never refused to return it while it was in its possession and control.
2. The mere assertion of the lien on the cargo does not constitute a conversion of it.
3. As title had passed to Empac by operation of law, Negocios could not convert from Goodpasture cargo it did not own.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

E. D. VICKERY

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Attorneys for Petitioner

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition for Writ of Certiorari with Appendix included therein has been served on all parties required to be served, i.e., on Respondent by placing the same in an envelope and depositing it in the United States mail, with first class postage prepaid, addressed to counsel of record in accordance with Rule 28.3, as follows: Michael Sydow, Esq., Eastham, Watson, Dale & Forney, Mellie Esperson Building, Houston, Texas 77002, on the 18th day of February, 1983.

E. O. Vickery

Of Royston, Rayzor, Vickery & Williams

INDEX TO APPENDIX

APPENDIX A

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Rule C provides in pertinent part as follows:

(1) *When Available.* An action in rem may be brought:

(a) To enforce any maritime lien; . . .

(2) *Complaint.* In actions in rem the Complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. . . .

(3) *Process.* Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the vessel or other property that is the subject of the action and deliver it to the marshal for service. . . .

Rule E provides in pertinent part as follows:

(1) *Applicability.* Except as otherwise provided, the rule applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory and partition actions, supplementing Rules B, C and D.

(2) *Complaint; Security.*

(a) *Complaint.* In actions to which this rule is applicable the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading. . . .

(4) *Execution of Process; Marshal's Return; Custody of Property . . .*

(b) *Tangible Property.* If tangible property is to be attached or arrested, the marshal shall take it into his possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal shall execute the process by affixing a copy thereof to the property in a conspicuous place and by leaving a copy of the complaint and process with the person having possession or his agent. In furtherance of his custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshal or his deputy or by the clerk that the vessel has been released in accordance with these rules. . . .

(9) *Disposition of Property; Sales.*

(b) *Interlocutory Sales.* If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of the property, the court, on application of any party or of the marshal, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, on the motion of defendant or claimant, order delivery of the property to him, upon giving of security in accordance with these rules. . . .

APPENDIX B

RECORD, VOLUME VI, pp. 16-30

RULING OF DISTRICT COURT ON MAY 30, 1979, REGARDING NATURE AND SCOPE OF POST SEIZURE HEARING

THE COURT: Well, do you have anything further to present or do you want to—

MR. SYDOW: Your Honor, our brief is pretty comprehensive. We still don't know what the procedural status is. With regard to the—

THE COURT: I think what I am going to do is take it under advisement, and I will give you a ruling by, say, Friday afternoon as far as his responsibility as to whether or not you have a maritime lien and then at that time I will order what I think should be done and you gentlemen can appeal from it or abide by it or do what you will.

MR. SYDOW: With regard to the request for a hearing, I ask what the Court's ruling is. Is it that a hearing will not be held on the merits of plaintiff's claim? Is this actually a motion for judgment on the pleadings?

THE COURT: What I'm doing, I imagine, is giving him his due process claims as to whether or not this arrest of the vessel is done without due process of law, as a deprivation of property without due process of law. In trying to satisfy the due process requirements by having this hearing at this time. Is that correct?

MR. KUYKENDALL: Your Honor, that's right. I think there are two issues. First of all, the Court has to

reach the issue under Rule C, if there is a maritime lien. In reaching that issue, it is my opinion that the Court must only look to the plaintiff's original complaint and what other affidavits or uncontested documents that have been submitted.

And in that connection, the plaintiff should be required today to correct the original pleading because I would be glad to provide an abundance of authority to show the original complaint cannot affect a seizure under Constitutional lines because it does not state knowledge in the possession of the corporation; knowledge of the attorneys is hearsay.

Like I say, we want a hearing on the merits and we don't want to delay the matter on procedural technicalities. If the Court rules that there is a maritime lien, then, in my opinion, the cases require that we go forward with a hearing to determine if the plaintiff can probably succeed. And I refer you to the Law Review article of the Maritime Law Association of the United States which Mr. McDaniel and Mr. Sydow and I and all martime lawyers are a member of that has a committee that advises the United States Supreme Court, I guess, or whoever makes the supplemental rules with regard to admiralty proceedings. And you will see in the footnote that they have suggested provisions to supplement the rules in view of the *Fuentes* case by the United States Supreme Court and other criteria.

They have a different suggestion than this textbook writer. The author of this Law Review article says that these suggestions is not sufficient. Every leading commentator that has been faced with the issues realizes that the supplemental rules do not meet the criteria as established in the

recent cases since about 1976 of the Supreme Court. The case that I have given you shows that Federal Rule B by one court has been ruled to be unconstitutional for seizing property and selling it without due process of law.

* * *

MR. SYDOW (Goodpasture's attorney): As to the requirement, due process requirement of a hearing, as I say, we have just received the supplemental brief and the citations to authorities today. However, I happen to have with me two cases which I can cite to the Court which are directly on point. They do not concern the quasi in rem proceedings under Rule B but the actual in rem proceedings under Rule C and E which are in issue here.

In both of these cases the courts have held that Rule C and E are Constitutional and within the exceptions in *Fuentes* and *W. T. Grant*, rules enunciated by the Supreme Court.

These cases are *Bethlehem Steel Corporation v. the S/T Valiant King*, 1977 American Maritime Cases 1719, a 1974 case. If the Court doesn't have access to the American Maritime Cases, we will be happy to provide Xerox copies of the case for the Court's consideration. The second case is *Central Soya Co. v. Cox Towing Corp.*

THE COURT: What is the cite on that American Maritime case? What is the page?

MR. SYDOW: 1719.

THE COURT: You might—well, I don't know. We probably have it.

MR. SYDOW: I will supply it. I would like an opportunity to reply to the supplemental brief, in any event, and I will attach copies of these cases.

THE COURT: Is my Friday deadline for ruling, is that too quick, do you think?

MR. SYDOW: Your Honor, the vessel owner movant has already placed us in the position of having to brief an entire area of law overnight. I don't see why we can't go ahead and go through another night and brief a reply for his supplemental brief.

THE COURT: It would be better for me, too, because I am going to get into this H.I.S.D. hearing for the next two weeks, and I would rather get rid of this.

MR. SYDOW: We will file it tomorrow morning, Your Honor.

THE COURT: All right.

MR. SYDOW: The second case upholding the Constitutionality, the exact arguments made against the vessel owner in this case. *Central Soya Co. v. Cox Towing Corp.*, 417 F.Supp. 658, a 1976 case.

THE COURT: What was the Fed Supp thing?

MR. SYDOW: 417 F.Supp. 658.

Those cases are commentators on the state of the law. These are cases decided by a District Court confronted with concrete situations. These involve exactly the rules in question here and not another rule to which different Constitutional considerations apply. That is Rule B. Rule B is the one that is addressed in the *Grand Bahama Co. v. Canada Transport.* It's an entirely different set of Constitutional considerations in connection with Rule B because trying to seize something which is not liable as a separate juridical entity for the reason alleged in the complaint, but is only liable because it is property of

somebody who did something wrong. Completely different set of Constitutional cases involved here.

The *Grand Bahama* case does not address an in rem cause of action against a vessel.

Your Honor, I think the remainder of our arguments are adequately set out in our brief and reply to the motion. We would ask the Court's leave to amend our original complaint to meet the objections brought forward by the vessel lawyer as to the sufficiency of the affidavit.

THE COURT: All right.

* * *

THE COURT: I think this whole problem is created by Empac.

MR. McDANIEL: I think we are far afield. We are now trying to resolve the issue of whether Mr. Kuykendall's client has a lien against the cargo. I thought this was a motion to lift the arrest and seizure of the vessel.

MR. KUYKENDALL: I agree, Your Honor. An argument concerning liens is irrelevant.

THE COURT: All right. I will get you a ruling by this Friday.

* * *

APPENDIX C

POST SEIZURE HEARING

MORNING SESSION

June 18, 1979

THE COURT: Goodpasture, Inc. versus the M/V Pollux, her engines, tackle, apparel, et cetera, Empac Grain Company and Negocios de Mar, S.A., her owners and/or operators, civil action number H-79-770. This is on motion to have a hearing as to the matters of the arrest of the ship and the question as to whether or not the ship should be released from the arrest or sold pursuant to the arrest.

Are you ready to go forward?

MR. SYDOW: Ready, Your Honor.

MR. KUYKENDALL: Defendant is ready, Your Honor.

MR. PEARSON: Empac is ready, Your Honor.

THE COURT: All right. You may proceed.

* * *

RULING OF DISTRICT COURT REFUSING TESTIMONY OF WITNESS WILLIAMS DURING POST SEIZURE HEARING

A. (WILLIAMS) Payment will be at the rate of $7,550 per day including overtime payable every 24 days in advance.

Q. (KUYKENDALL, Negocios attorney) And what —the in advance payment, when is that supposed to be paid?

A. That is supposed to be paid immediately after delivery.

Q. What about other payments before the voyage commences?

A. The charterers have no obligation to pay any other money prior to delivery of the vessel.

Q. Was there agreement to pay bunkers?

A. Yes, sir, correct. It's stipulated in the charter party that bunkers on delivery will be paid at the same time the first is paid.

MR. SYDOW: We realize this case is being tried to the court, but none of this is really material to the issues in this hearing today.

THE COURT: I don't think so either. I can't see the materiality of what their contract or their charter dispute with Empac has to do with this case—with what we are hearing today, rather.

MR. KUYKENDALL: If the plaintiffs are waiving their argument that we pulled up here to that dock in

order to create a maritime lien that we knew before we pulled up there they weren't going to be paid under the charter party, there is no reason to put him up there. If that is no longer the contention in this case, I would agree with the court.

MR. SYDOW: It's simply that that's not being tried here today.

THE COURT: I don't think that's being tried here today either.

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-79-770

(Filed June 20, 1979)

GOODPASTURE, INC.,
Plaintiff,

v.

M/V POLLUX, ETC., ET AL,
Defendant,

and

NEGOCIOS DEL MAR, S.A.,
Third Party Plaintiff,

v.

A SHIPMENT OF WHEAT,
etc., et al,
Third Party Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On June 19, 1979 the cause herein came on for hearing before the Court on Plaintiff's *in rem* claim against the M/V POLLUX. The Court makes the following Findings of Fact and Conclusions of Law:

1. Plaintiff, Goodpasture, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Texas.

2. The M/V POLLUX is an ocean going vessel engaged in commerce upon navigable waters of the United States.

3. Negocios del Mar, S.A. is a business entity organized and existing under and by virtue of the laws of a foreign nation.

4. Negocios del Mar is, and at all times under consideration herein was, the owner of the M/V POLLUX.

5. Negocios del Mar does not maintain an office in the United States and has no officer, agent, or director permanently situated in the United States or within this jurisdiction.

6. Negocios del Mar has no property in the United States except the M/V POLLUX, and has no employees in this jurisdiction other than the master, officers, and crew of the POLLUX.

7. On March 20, 1979, Goodpasture, acting through its subsidiary Goodpasture Export Corp., entered into a contract to sell 20,000 metric tons of No. 2 hard red winter wheat, 10% more or less at buyer's option, to Empac Grain Corp. Under the terms of that sale Empac was to set up an irrevocable letter of credit in a major U. S. bank payable to Goodpasture in an amount sufficient to pay for 22,000 metric tons of wheat. The bank was to be instructed to pay Goodpasture upon presentation of documents, one of which was a bill of lading.

8. After the original contract had been reached, but before any performance had taken place on either side, Empac requested that the contract be renegotiated. Instead of setting up a letter of credit in favor of Good-

pasture, Empac wanted to assign to Goodpasture a portion of the letter of credit set up for Empac by Epac's customer, Idema. Payment under the Idema-Empac letter of credit was to be made against documents, including a freight prepaid bill of lading.

9. On or about March 30, 1979 a new contract was reached between Empac and Goodpasture for the sale of the grain. The quantity and price terms remained the same as those negotiated on March 20. The payment terms of the new contract provided that Goodpasture received an irrevocable assignment of so much of the Idema-Empac letter of credit as would be necessary to pay for the grain. As an additional part of this contract Empac agreed to issue freight prepaid bills of lading upon the completion of loading. It was agreed that the bills of lading would show Empac to be the shipper, but that Goodpasture would be entitled to possession of the bills of lading until Goodpasture was paid under the Idema-Empac letter of credit.

10. Under the terms of the sale from Goodpasture to Empac, the grain was to be stowed and trimmed by Empac. Under the usage in the grain trade, a contract under which the buyer stows and trims the vessel is called an "ex spout" sale.

11. Under the custom and usage in the grain trade, title to the grain does not pass until payment is made. Both parties were aware of this custom and usage in the grain trade, and negotiated this contract pursuant to that custom and usage. The usage forms a part of and is a term of the contract between the parties.

12. Both parties understood that title to the grain was not to pass from Goodpasture to Empac until payment

was made under the letter of credit in the Central National Bank of Miami.

13. After the original contract between Empac and Goodpasture, but before the March 30 contract, Empac entered a charter party with Negocios del Mar for the M/V POLLUX to carry the grain from Houston to Buenaventura, Colombia. Clause 35 of the Empac-Negocios charter party reads "master will authorize charterers or their agents to sign bills of lading in his behalf, but bills of lading to be in accordance with mates and tally clerks receipts." The charter party, at Clause 14, further provided that the vessel was to be delivered on or before March 30, 1979. Charter hire was payable at the rate of $7,550 per day beginning on the date the vessel was delivered at Houston (Clause 4), the first 24 days hire to be paid in advance by Empac (Clause 5).

14. Empac assured Goodpasture that Empac was authorized by Negocios to sign freight prepaid bills of lading on behalf of the master. Receipt of this authority from Negocios was confirmed by Empac's Houston agent.

15. The vessel arrived at Houston on or about April 6, 1979. Negocios del Mar tendered the vessel to Empac and demanded prepayment of the first 40 days charter hire. Between April 6 and April 11, 1979, Negocios repeatedly demanded payment of the charter hire. On April 11, 1979 Empac, through Mr. Vatistas, assured Negocios that the money had been transferred. On the basis of Empac's assurance Negocios did not withdraw the ship and permitted it to be loaded.

16. When loading was completed Goodpasture prepared a freight prepaid bill of lading, showing the quantity of grain loaded and its condition in accordance with the

mate's and tally clerk's receipts. The bill of lading was prepared in accordance with instructions from Empac.

17. The loading of the M/V POLLUX was completed at 1546 hours on April 12, 1979. Approximately 45 minutes later, Negocios del Mar, through its Houston agent, notified Empac, through its local agent that Empac's authority to issue bills of lading was revoked and that only Hansen & Tidemann and/or the master of the vessel could issue such bills of lading.

18. The charterer's authority to issue bills of lading was revoked in pursuance of the shipowner's plan to withhold issuance of such bills of lading until charter hire for the proposed voyage, plus the costs of bunkers, was paid in advance.

19. On April 13, 1979 Negocios del Mar informed Goodpasture that it would not issue freight prepaid bills of lading until it received payment in full for the proposed voyage, plus bunkers, port charges and costs for transitting the Panama Canal. Negocios suggested that Goodpasture advance these funds. Goodpasture declined on the grounds that it had no obligation to finance either Negocios del Mar or Empac under law or under the charter party.

20. Goodpasture, on April 13, 1979, filed this suit for conversion against the POLLUX, Negocios del Mar, and Empac in order to prevent the POLLUX from sailing from Houston with Goodpasture's grain. Pursuant thereto, the United States Marshal seized the POLLUX on the same day and the vessel still remains under seizure.

21. Goodpasture claimed that it was entitled to the execution of "freight prepaid" bills of lading, the return

of its cargo, or a security bond in the amount of $3,500,000.00. The vessel owner refused to execute such "freight prepaid" bills of lading and contended that Goodpasture, Inc. was not the proper party to receive the bills of lading. The bills of lading show that the shipper of the cargo was Empac Grain Co., and the vessel owner at all times stood willing to provide the executed "freight prepaid" bills of lading to Empac Grain Co. if Empac Grain Co. would pay freight and bunkers in accordance with the Charter Party.

22. Empac, Negocios and Goodpasture explored various possibilities for resolving the dispute in such a way as to effect the grain sale and avoid the expense associated with unloading the POLLUX.

23. On April 25, 1979 Goodpasture made the first written demand upon Negocios to return the grain to Goodpasture.

24. After considerable delay, and after extensive negotiations with Central National Bank of Miami and with Idema, it appeared that no payment would be made either to Goodpasture or to Negocios under the letter of credit.

25. The vessel owner withdrew from the Charter Party on May 23, 1979.

26. Thereafter, Negocios filed a claim of owner to the POLLUX, asserted certain counterclaims against Goodpasture, and filed a Third Party Complaint against the grain on board the POLLUX. At the same time, Negocios requested that the Court order the grain sold. Goodpasture filed a claim of owner to the grain and an answer to the Third Party Complaint and counterclaim. Goodpasture then posted security in the amount and the form required by Negocios. Goodpasture reserved its right to

have the Court determine necessity for and amount of security to be required for Negocios claims, and Negocios agreed that the Court should make those determinations.

27. On June 5, 1979 the Court ordered that the grain be discharged into the custody of Goodpasture.

CONCLUSIONS OF LAW

1. Negocios' refusal to sign freight prepaid bills of lading did not constitute conversion of Goodpasture's wheat.

2. Negocios was under no statutory or contractual obligation to issue bills of lading in any form to Goodpasture.

3. Goodpasture has no *in rem* right against the vessel.

In accordance with the above Findings of Fact and Conclusions of Law it is hereby ORDERED that the seizure of the M/V POLLUX is lifted and the United States Marshal is instructed to release the M/V POLLUX from arrest.

It is further ORDERED that the Plaintiff's Second Amended Original Petition is DISMISSED as to the M/V POLLUX.

It is further ORDERED that all costs of court associated with the arrest and seizure of the M/V POLLUX and all other assets covered by the arrest are taxed against Plaintiff Goodpasture, Inc.

Signed at Houston, Texas this 20th day of June, 1979.

/s/ ROBERT O'CONOR, JR.
Robert O'Conor, Jr.
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSON DIVISION

CIVIL ACTION NO. H-79-770

(Filed June 22, 1979)

GOODPASTURE, INC.,
Plaintiff,

v.

M/V POLLUX, etc., et al,
Defendant,

and

NEGOCIOS DEL MAR, S.A.,
Third Party Plaintiff,

v.

A SHIPMENT OF WHEAT, etc., et al,
Third Party Defendant,

ORDER

Plaintiff Goodpasture, Inc. having applied in open Court on this 22nd day of June, 1979 for an Order expressly directing the entry of Final Judgment on the Order of this Court dated June 20, 1979, upon an express determination that there is no just reason for delay, and the Court having examined the pleadings and papers on file, and having been duly advised on the premises, and due deliberation having been had thereon,

pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, it is hereby

DETERMINED that there is no just reason for delay in the entry of Final Judgment herein on the Order of this Court dated June 20, 1979 dismissing Plaintiff's Second Amended Original Complaint as to the M/V POLLUX and lifting the seizure of the M/V POLLUX and directing the Marshal to release the M/V POLLUX from arrest, and it is

ORDERED that such Final Judgment be entered herein forthwith.

Dated at Houston, Texas this 22nd day of June, 1979.

/s/ ROBERT O'CONOR, JR.
United States District Judge

MOTION MADE AND ENTRY REQUESTED:

/s/ MICHAEL D. SYDOW
Michael D. Sydow
Attorney in Charge for Goodpasture, Inc.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I mailed a copy of the foregoing Order to Ken Kuykendall, Royston, Rayzor, Vickery & Williams, 3710 One Shell Plaza, Houston, Texas 77002, and to Jacqueline McCreary, Clann & Pearson, 4150 Westheimer, Suite 333, Houston, Texas 77027, on this 21st day of June, 1979.

/s/ MICHAEL D. SYDOW
Michael D. Sydow

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. H-79-770

(Filed June 22, 1979)

GOODPASTURE, INC.,
Plaintiff

v.

M/V POLLUX, etc., et al
Defendant,

and

NEGOCIOS DEL MAR, S.A.,
Third Party Plaintiff

v.

A SHIPMENT OF WHEAT, etc., et al,
Third Party Defendant.

ORDER GRANTING STAY

This matter having come on regularly for hearing on the application of Plaintiff, pursuant to Federal Rule of Appellate Procedure 8(a) for stay of this Court's order of June 20, 1979 pending an expedited appeal from that Order to the United States Court of Appeals for the Fifth Circuit, and the Court being fully advised in the premises, it is

ORDERED that the Court's order of June 20, 1979 dismissing the Plaintiff's Second Amended Original Complaint as to the M/V POLLUX and lifting the seizure of the M/V POLLUX and releasing the M/V POLLUX from arrest is hereby stayed pending expedited appeal to the United States Court of Appeals for the Fifth Circuit.

DONE at Houston, Texas this 22nd day of June, 1979.

/s/ ROBERT O'CONOR, JR.
United States District Judge

MOTION MADE AND ENTRY REQUESTED:

/s/ MICHAEL D. SYDOW
Michael D. Sydow
Attorney in charge for Goodpasture, Inc.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-2507

(Filed August 13, 1979)

GOODPASTURE, INC.,
Plaintiff-Appellant Cross Appellee,

v.

M/V POLLUX, ETC., ET AL.,
Defendants-Appellees,

NEGOCIOS DEL MAR, S.A.,
her owners and operators,
Defendants-Appellees Cross Appellants.

Appeals from the United States District Court for
the Southern District of Texas

Before WISDOM, CLARK and GEE, Circuit Judges.

BY THE COURT:

For reasons to be stated in an opinion which we shall shortly hand down, the order of the District Court dismissing the second amended complaint of Goodpasture, Inc. as to M/V Pollux, lifting the seizure of it, and releasing it from arrest is reversed and the cause is remanded for further proceedings. The time for filing petition for rehearing is extended to 14 days after the filing of our opinion.

REVERSED AND REMANDED

APPENDIX H

GOODPASTURE, INC.,
Plaintiff-Appellant Cross-Appellee,

v.

M/V POLLUX, etc., Defendant-Appellee
Cross-Appellant,

Negocios del Mar, S. A., Defendant-
Third-Party Plaintiff-Appellee
Cross-Appellant.

EMPAC GRAIN CO., etc., Defendant-
Appellee Cross-Appellant,

v.

A SHIPMENT OF WHEAT OF 19,067.949
METRIC TONS PRESENTLY ONBOARD
the M/V POLLUX, in rem,
Third-Party Defendant-Appellee.

No. 79-2507.

United States Court of Appeals,
Fifth Circuit.

Sept. 10, 1979.

Rehearing and Rehearing En Banc
Denied Oct. 18, 1979.

A seller of wheat brought an in rem action against the vessel in which the wheat was to be shipped, claiming that the assertion of a maritime lien against the cargo

was improper. The United States District Court for the Southern District of Texas, Robert O'Conor, Jr., J., dismissed the suit, and the seller appealed. The Court of Appeals, Gee, Circuit Judge, held that under the circumstances of record the ship had no claim against the seller to support the maritime lien asserted against the cargo, and that the seizure of the cargo by the ship's owner as security for his claim against the buyer of the wheat was a maritime tort giving rise to an in rem claim in the seller against the vessel.

Reversed and Remanded.

Michael D. Sydow, Houston, Tex., for plaintiff-appellant cross-appellee.

E. D. Vickery, Kenneth D. Kuykendall, Houston, Tex., for Negocios del Mar.

John R. Pearson, Houston, Tex., for Empac Grain Co.

Appeals from the United States District Court for the Southern District of Texas.

Before WISDOM, CLARK and GEE, Circuit Judges.

GEE, Circuit Judge:

The facts of this unfortunate case present a maritime version of the eternal triangle, one in which the difficulties arising between each of the three (or perhaps four or five) actors transcend their relationship to bedevil the others.

Plaintiff Goodpasture, Inc. is a Texas corporation that deals in wheat. Defendant M/V POLLUX, an ocean-going vessel engaged in commerce upon navigable waters

of the United States, is owned by defendant Negocios del Mar, a foreign corporation. Negocios del Mar has no offices or permanent officials in the United States, no property there except the M/V POLLUX, and no employees in this jurisdiction other than the complement of the POLLUX.

Early this year Goodpasture contracted to sell a large quantity of wheat to Empac Grain Corporation, Inc. Under the terms of that sale, Empac was to set up in a major stateside bank an irrevocable letter of credit payable to Goodpasture for an amount sufficient to cover this wheat. The bank was to be instructed to pay Goodpasture upon presentation of various documents, one a bill of lading. After this original contract had been reached but before any performance by either side, Empac requested that the contract be renegotiated to permit, rather than a letter of credit in favor of Goodpasture, an assignment by Empac to Goodpasture of a portion of the letter of credit set up for Empac by its customer Idema, a Colombian entity. Payment under the Idema-Empac letter of credit was to be made against documents, including a freight prepaid bill of lading.

Shortly thereafter, such a new contract was agreed on between Empac and Goodpasture. The quantity and price terms remained the same, but the payment terms of the new contract provided for an irrevocable assignment to Goodpasture of so much of the Idema-Empac letter of credit as would be necessary to pay for the grain. For its part, Empac agreed to issue Goodpasture freight prepaid bills of lading upon the completion of loading. These bills would show Empac as the shipper, but Goodpasture would be entitled to possession of them until Goodpasture

was paid under the Idema-Empac letter of credit. Under the terms of the sale, the grain was to be stowed and trimmed by Empac, a type of contract known in trade usage as an "ex spout" sale.

Under a further trade custom and usage, title to such grain does not pass until payment is made. Both Goodpasture and Empac were aware of this custom and usage in the grain trade, and each negotiated this contract pursuant to that custom and usage, which forms a part of and is a term of the contract between the parties. Both parties, therefore, understood that title to the grain was not to pass from Goodpasture to Empac until payment was made under the Idema-Empac letter of credit.

After the original sales contract but before its renegotiation, Empac entered a time charter party with Negocios del Mar for M/V POLLUX to carry this grain from Houston to Colombia. Clause 35 of the Empac-Negocios charter party reads, "master will authorize charterers or their agents to sign bills of lading in his behalf, but bills of lading to be in accordance with mates and tally clerks receipts." The charter party further provided that the vessel was to be delivered on or before March 30, 1979. Charter hire was payable at a daily rate beginning on the date the vessel was delivered at Houston, the first 24 days hire to be paid in advance by Empac. Empac assured Goodpasture that Empac was authorized by Negocios to sign freight prepaid bills of lading on behalf of the master. Receipt of this authority from Negocios was confirmed by Empac's Houston agent.

The vessel arrived at Houston about a week late, when Negocios tendered the vessel to Empac and demanded

prepayment of the first 40 days charter hire. Between April 6 and April 11, 1979, Negocios repeatedly demanded payment of the charter hire. On April 11, 1979, Empac assured Negocios that the money had been transferred. On the basis of this assurance, Negocios did not withdraw the ship from the charter and permitted it to be loaded. When loading was completed, Goodpasture, in accordance with Empac's instructions, prepared a freight prepaid bill of lading showing the quantity of grain loaded and its condition in accordance with the mate's and tally clerk's receipts.

About 45 minutes after loading of M/V POLLUX was completed, Negocios notified Empac that Empac's authority to issue bills of lading was revoked and that only Negocios' agent or the master of the POLLUX could issue them. This was done in pursuance of the shipowner's plan to withhold issuance of such bills of lading until charter hire for the proposed voyage, plus the costs of bunkers, was paid in advance. The next day, Negocios informed Goodpasture that it would not issue freight prepaid bills of lading until it received payment in full for the proposed voyage, plus bunkers, port charges, and costs for passing the Panama Canal, suggesting that Goodpasture advance these funds. Goodpasture declined on the ground that it was not obliged to finance Negocios or Empac under either law or charter party. Goodpasture then filed this suit for conversion against M/V POLLUX, Negocios and Empac to prevent the POLLUX from sailing from Houston with Goodpasture's grain, causing the United States Marshall to seize the POLLUX on the same day. The vessel still remains under seizure. Goodpasture claimed that it was entitled either to the execution of "freight prepaid" bills of lading, the return of its

cargo, or a security bond in the amount of $3,500,000. The vessel owner refused to execute such "freight prepaid" bills of lading and contended that Goodpasture was not the proper party to receive the bills of lading. The bills of lading show that the shipper of the cargo was Empac, and the vessel owner at all times stood willing to provide the executed "freight prepaid" bills of lading to Empac if Empac would pay freight and bunkers in accordance with its charter party. Empac, Negocios and Goodpasture explored various possibilities for resolving the dispute in such a way as to effect the grain sale and avoid the expense associated with unloading the POLLUX.

On April 25, Goodpasture made the first written demand upon Negocios to return the grain to Goodpasture. After considerable delay and after extensive negotiations with the bank issuing the Idema-Empac letter of credit and with Idema, it became apparent that no payment would be made either to Goodpasture or to Negocios under that letter. Negocios then withdrew from the charter party. Thereafter, Negocios filed a claim of owner to the POLLUX, asserted certain counterclaims against Goodpasture, and filed a third-party complaint against the grain on board the POLLUX. At the same time, Negocios requested that the court order the grain sold. Goodpasture filed a claim of owner to the grain and an answer to the third-party complaint and counterclaim. Goodpasture then posted security in the amount and form required by Negocios. Goodpasture reserved its right to have the court determine necessity for and amount of security to be required for Negocios' claims, and Negocios agreed that the court should make those determinations. On June 5,

1979, the court ordered that the grain be discharged into the custody of Goodpasture.

Having found the above facts,[1] the district court concluded that Negocios' refusal to sign freight prepaid bills of lading did not constitute conversion of Goodpasture's wheat, that Negocios was under no statutory or contractual obligation to issue bills of lading in any form to Goodpasture, and that Goodpasture had no *in rem* right against the vessel. It therefore ordered the seizure of the M/V POLLUX lifted, released the POLLUX from arrest, and dismissed Goodpasture's suit against POLLUX. A stay of this order, certification, and this expedited appeal followed. We reverse.

The question on this appeal, once seen, is simple and narrow: did the ship have a claim against Goodpasture to support the maritime lien it asserted against the ship's cargo of Goodpasture's wheat? From the answer to this inquiry all else follows, since if Negocios and POLLUX had no claim, they had no lien; and if they had no lien, their assertion of a possessory right in Goodpasture's grain and their refusal either to carry or to release it was wrongful. And if wrongful, then Goodpasture had a claim against the vessel, justifying the suit and attendant seizure of it. We conclude that the POLLUX had no claim against Goodpasture; hence our judgment.

The shipowner's rights under the time charter ran against Empac, which had "rented" the ship by the day for the cruise to Colombia. We assume, *arguendo*, that Empac was in arrears under this charter and that had the wheat been Empac's, the ship and its owner, Negocios,

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1. Our statement of facts is a paraphrase of the court's findings.

would have had a claim upon it. The trial court found, however, that title to the grain never passed from Goodpasture to Empac because Empac never paid Goodpasture for it. Goodpasture had no contract with Negocios, only with Empac; did not care whether the wheat was carried on Colombia, to Timbuktu, or was consumed on board by mice so long as it was paid for it; and owed no duties to the ship or Negocios except those exacted of all by the law in general.[2] In particular, whatever rights to payment for use of the POLLUX Negocios may have had against Empac, the charterer, did not run against Goodpasture or its wheat.

It remains to consider whether the seizure of Goodpasture's wheat by Negocios as security for its claims against Empac was a maritime tort giving rise to an *in rem* claim in Goodpasture against the POLLUX. *The LYDIA*, 1 F.2d 18 (2d Cir. 1924), carries us most of the way to our destination. There British & Foreign Agencies, Ltd. chartered M/V LYDIA to load and transport coal contracted for with McKenzie Company. As in our case, all contractual rights and duties in this triangle passed through British & Foreign (buyer), McKenzie (seller) and the shipowner having none between themselves. A dispute under the charter having arisen, LYDIA nevertheless loaded McKenzie's coal, asserted a charter-party lien against it, and sailed away. Our brothers of the Second Circuit found that in these circumstances a maritime tort

2. And since there was no contract between Negocios and Goodpasture, even had Goodpasture had an interest in POLLUX' carrying the wheat cargo somewhere, there was no agreement between them to alter the settled principle of American maritime law that "freight is not earned unless and until the goods are delivered to their destination." *United States v. Waterman S.S. Corp.*, 397 F.2d 577, 578 (5th Cir. 1968). The POLLUX never left the loading dock.

of conversion, giving rise to *in rem* suit against the LYDIA, had occurred. We agree.

Our situation here is less aggravated, for POLLUX did not sail but merely asserted a claim in the nature of a maritime lien against the wheat. That claim was asserted with the intent to hold the wheat hostage against Empac's time charter arrears, and the record is undisputed that Negocios had no intention of releasing the wheat to Goodpasture or anyone else until the charter hire was paid. Here was no puffery or negotiating bluff but a real and manifested claim on the wheat by one in actual possession of it at clear variance with the rights of its owner, one which has been manfully maintained to this day. Goodpasture, indeed, only obtained discharge of the wheat by posting the very substantial security demanded by Negocios. We think these actions by Negocios were sufficiently at variance with the right to possession of the wheat by its owner, Goodpasture, to constitute conversion, which we have defined in a landside context as "the unlawful and wrongful exercise of dominion, ownership or control over the property of another, to the exclusion of the same rights by the owner." *Bankers Life Insurance Co. v. Scurlock Oil Co.*, 447 F.2d 997, 1004 (5th Cir. 1971). *See also Norris v. Bovina*, 492 F.2d 502 (5th Cir. 1974). In accordance with our prior order of August 2, 1979, the cause is

REVERSED AND REMANDED.

APPENDIX I

RULING OF DISTRICT COURT ON SEPTEMBER 17, 1979 SETTING CASE FOR TRIAL ON MERITS

THE COURT: Sure. At the time of trial everything is open.

MR. PEARSON: We start all over at the time of trial.

MR. SYDOW: Save and except for the matters presented to the Fifth Circuit.

THE COURT: I would think at the time of trial everything is open. New ball game.

MR. KUYKENDALL: That's the way I see it.

MR. McDANIEL: Your Honor, I think we better talk about that a little bit because we are going to have a long way to go.

MR. SYDOW: We won't be able to agree on anything at all if the question of liability is still open.

THE COURT: Well, a trial is a trial.

MR. SYDOW: There is such things as bifurcated trials on liability and damages which is what, in effect, we have had here. We have had an appeal from the final judgment of the Court holding that we had no cause of action against Negocios Del Mar and an appellate decision saying that we do. From our view the only thing open at this point is how much our damages are.

THE COURT: I think the entire thing is going to be heard. I don't know. You are going to get a panel?

MR. SYDOW: I don't think we need one. I think we have already disposed of the liability issue.

THE COURT: I don't think so. We remanded it.

MR. SYDOW: No evidence has been presented as to the amount of damages. We can't render a judgment without an amount.

THE COURT: I would suggest that the whole case go forward before the trial court.

MR. SYDOW: If that is the case, it would probably take more than four days because we had two days on liability.

THE COURT: All right. Whatever it takes.

* * *

APPENDIX J

RULING OF DISTRICT COURT ON FEBRUARY 27, 1980 AT START OF SHOW CAUSE HEARING

MR. KUYKENDALL: There is one more item that we have, and that is concerning our request that the Court reconsider its ruling in December and in calling that matter for a show cause hearing and instead call the case for trial on the merits.

THE COURT: Well, the problem is I think everybody is—according to my recollection, it's a misnomer of the situation. But at any rate, as to what I thought we were trying last time, but evidently your firm was also guilty of that. And perhaps by consent we did try it on the merits at that time. At any rate, I think that by this vehicle of show cause hearing which you will be able to put on the evidence that you would have put on in any event if it were a trial on the merits.

MR. KUYKENDALL: As I understand, what I see it is trying to let the defendant go forward and put on any evidence it wants to on the basic cause. But my problem is that in choosing this vehicle that the Court has shifted the burden of proof to defendants to carry forward and show why the plaintiff shouldn't win in this case.

THE COURT: I think that is somewhat foreclosed, going within the parameters set for us by the Fifth Circuit. So this is not—

MR. KUYKENDALL: At the time of the initial hearing on June 18, we could have only tried unless we agreed

to try something by consent, we could only try what was called for trial by the Court.

THE COURT: In the appeal it was called a trial on the merits.

MR. SYDOW: Not only in brief but also in oral conferences before Judge Gee in Austin these representations were made. The issues that are despositive of the case were fully litigated at the prior hearing, the issue of title and ownership. The only thing that Mr. Kuykendall has ever brought up in any of our briefs or conferences with the Court in opposition to that idea is the fact that Jerome Williams was not allowed to testify by the Court last time on grounds of relevance. However, subsequently, as the transcript of the prior—

THE COURT: I think at that time I thought I was trying something else. At any rate, perhaps I should have let him testify.

MR. SYDOW: In any event, the defendant did not complain of that on appeal and admitted to this Court that the testimony was merely cumulative, so there is no prejudice that can be shown to the defendant in any event.

THE COURT: Anyway, in an abundance of fairness, I think I am trying to allow you to have your say here, and we will take it under consideration, and, of course, I think by the time it's over perhaps both sides will appeal the ruling of this Court and then we will go on from there.

* * *

Also I would like to call to the Court's attention the transcript of the previous trial, page three, the Court's announcement. "The Court: Goodpasture, Inc. versus M/V Pollux, her engines, her tackle, her apparel, et cetera, Empac Grain Company, and Negocios Del Mar, S.A., her owners and her operators, civil action H-79-770. This is a motion to have a hearing as to the matters of the arrest of the ship and to request as to whether or not the ship should be released from the arrest or sold pursuant to the arrest." And that's contained in the transcript.

THE COURT: That's what I thought I was trying, but evidently it expanded into something else. And on appeal it was on the merits.

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-79-770
Consolidated with
CIVIL ACTION NO. H-79-890

GOODPASTURE, INC.

v.

M/V POLLUX, etc., et al.

and

NEGOCIOS DEL MAR, S.A.

v.

A SHIPMENT OF WHEAT OF 19,067.949 METRIC TONS PRESENTLY ONBOARD THE M/V POLLUX, *in rem* and EMPAC GRAIN CO. and GOODPASTURE, INC., *in personam*

(Filed June 11, 1980)

MEMORANDUM AND ORDER

This cause of action, whose journeys to and from the appellate court present a stark contrast to the actual "road not taken" by Robert Frost's contemplative traveler, necessitates a rather detailed analysis both of the facts giving rise to this lawsuit and of its procedural history.

After reviewing the events leading up to this lawsuit and examining the procedural history of the case, the

issues that now remain before this Court for dispositive action will be defined, this Court's resolution of those issues will be explained, and the damages, if any, to which the parties may be entitled (and from whom) will be determined.

I. *The South American Connection*

The genesis of this controversy began with a "contract" for the sale of wheat from an Argentinian corporation, Empac Cereales, S.A., (hereinafter Cereales) to a Columbian governmental entity, Idema. Pursuant to this agreement Cereales was obligated to procure and deliver to Buenaventura, Columbia 20,000 metric tons (more or less 10%) of number two hard red winter wheat. The corporate entity through which Cereales sought to meet its obligations under the Idema contract was Empac Grain Corporation, Inc. (hereinafter Empac), a New York corporation: that is, Empac was responsible for securing the wheat and for making all the necessary shipping arrangements.[1] In return for its services, Empac was to receive 20% of the profit realized by Cereales.

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1. An understanding of the relationship between Empac Grain Corporation, Inc., Empac Cereales, S.A., and Property Corporation, S.A. is relevant at this point. In March, 1979, Property Corporation (hereinafter Property) was the sole shareholder of Empac Grain Corporation and presumably funded Empac's activities. The grain contract at the base of this lawsuit was Empac's initial (and as of February 1980 its only) business venture.

At the hub of the Property-Cereales-Empac wheel was Mr. George Gonzalez, an Argentine resident. He served (and presumably still serves) as President of Property and, from October 1976 through October 1979, as President and Director of Cereales. Mr. Gonzalez was the man who initially contacted Mr. Osvaldo Grzesik to serve simultantously as President and Treasurer of Empac. The remaining officer positions in Empac Grain were filled by one Luis Ramos, who served as Vice President and Secretary. After Mr. Gonzalez obtained the Idema grain contract in the name of Cereales he then, through Property, established Empac for the purpose of handling the deal.

Empac secured the services of two agents for the purpose of handling the details of the transaction: Mr. Dave Mezias was employed to find someone who was willing and able to sell the grain, and Mr. Georgios Vatistas was put in charge of finding a vessel to transport the grain to Columbia.[2] In March of 1979, Mr. Mezias[3] contacted Goodpasture and asked to purchase approximately 20,000 metric tons of wheat. After some negotiation, the terms of the sale were finalized and provided for the delivery of 20,000 metric tons (10% more or less at buyer's option) of number two hard red winter wheat FOB vessel at one safe Texas berth (unstowed/untrimmed)[4] at 74 cents per bushel over the Kansas City May futures price for wheat. Payment was to made by a confirmed irre-

2. Neither Mr. Mezias nor Mr. Vatistas was paid a salary by Empac. Rather, they were to receive a percentage commission upon the consummation of the sale and charter party respectively.

3. Mr. Mezias represented to Goodpasture that Empac Grain Corp. was affiliated with the World Trade Group (hereinafter WTG), an entity with which Goodpasture had conducted business with on several prior occasions. Some question was raised at trial concerning the extent of WTG's affiliation with Empac. While the evidence did not show that WTG was connected with Empac in any corporate sense, Mr. Eduardo Gonzalez, the brother of George Gonzalez, directed many of WTG's affairs. Additionally, one Mr. Chirieleison, who maintained the financial records of Empac, was employed by WTG. Mr. Mezias, who was employed by WTG before going to work for Empac, utilized the WTG's facilities in Washington, D.C. in making arrangements for the Goodpasture/Empac sale. Finally, as a condition precedent to entering into the contract for the sale of grain to Empac, Goodpasture demanded that certain outstanding claims that Goodpasture had against WTG stemming from prior sales be settled. These claims were in fact timely settled, through Mr. Mezias, thus lending credence to Mr. Mezias' representations.

4. Because Empac was to be responsible for the stevedoring charges necessary to stow and trim the cargo aboard the vessel, the sale was not an FOB sale in the strict sense of that term. As evidenced by the March 19 Confirmation of Sale and by the oral testimony, the instant sale is known in the grain industry as an "ex spout" sale.

vocable letter of credit in favor of Goodpasture. The documentation necessary to secure payment under the letter of credit was designated in the March 19 confirmation of sale, as follows: 1. Commercial invoice, 2. Bill of Lading, 3. Certificate of Weight, 4. Phytosanitary Certificate, 5. Certificate of Analysis, 6. Certificate of Inspection, 7. Certificate of Origin. The NAEGA II Rules, which were promulgated by the grain industry, were designated to govern the sale.

Meanwhile, negotiations for the chartering of a vessel to transport the grain from Houston to Columbia had been initiated. Mr. Jerry Williams on behalf of Negocios del Mar, S.A. (hereinafter Negocios)[5] and Mr. Vatistas on behalf of Empac entered into negotiations which eventually led to a time-charter party agreement between Negocios and Empac. The time charter was drafted on the standard New York Produce Exchange Form and incorporated several provisions to fit this particular transaction. The provisions that have particular relevance in this suit include: The vessel's original Houston ETA was March 26, 1979; the hire of $7,500 per day was to be paid for the first twenty-four days in advance; and the Master was to authorize the charterer to sign Bills of Lading in his behalf so long as they were "in accordance with the mates and tally clerks receipts".

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5. Negocios del Mar, S.A. is a Peruvian shipping concern that owns the *M/V POLLUX*, the vessel eventually contracted to transport the grain to Columbia. Negocios' chartering agent, Odin Marine, employed Mr. Williams. Mr. Williams, upon hearing of the impending grain sale and knowing that Negocios was interested in carrying a cargo from the U. S. Gulf Coast to the West Coast of South America, initiated the discussions with Empac. Mr. Williams understood that Woodbury Chartering handled the chartering arrangements for Empac and accordingly contacted them initially. Woodbury referred Mr. Williams to Mr. Vatistas.

Until this stage all negotiations had proceeded relatively smoothly: The *POLLUX* was scheduled to arrive at Goodpasture's loading berth on March 26, 1979, take on the grain and sail for Buenaventura; Empac would in turn pay Goodpasture for the grain and pay Negocios' twenty-four days advance charter hire. Prior to performance by any party, however, difficulties began to surface which cumulatively and eventually sabatoged the entire transaction.

First, Empac, because of a dearth of cash or credit (or both), requested to amend its agreement with Goodpasture in order to provide for an alternate form of payment. Instead of establishing the irrevocable letter of credit in favor of Goodpasture as originally agreed, Empac proposed that Goodpasture accept an assignment of proceeds of a letter of credit established by Idema in a Columbian bank. Goodpasture assented to this amendment with the proviso that it be nominated as Empac's agent for the purposes of collecting all the documents necessary for payment under the letter of credit and submitting them to the Central National Bank of Miami (hereinafter CNB). The CNB was to serve as the confirming bank and was to pay Goodpasture pursuant to the Empac/Idema assignment upon presentation of the proper documents.

The second complication arose when the *POLLUX*, which had suffered some damage on its immediately preceding voyage from Europe to the United States, became detained longer than was expected while undergoing repairs at New Orleans. The delay was the result of the vessel owner's difficulty in obtaining new anchor chains, which needed to be replaced before the vessel could obtain

the necessary certification to carry cargo. Mr. Williams and Mr. Vatistas maintained close communication with each other during the vessel's detention in New Orleans, and they in turn advised their respective principals of the developments during this time. The anchor chains were ultimately delivered and installed, however, thus enabling the vessel to arrive at Houston on April 5, 1979, approximately six days after the final deadline established by the parties.[6] Notwithstanding the vessel's late arrival, Empac accepted the vessel and on April 11, 1979, Goodpasture began loading the grain aboard the *POLLUX*.

The third and final problem arose after the vessel had been fully loaded. The Bills of Lading, as presented to the master,[7] provided that the freight on the cargo was prepaid. The master, on instructions from the vessel owner, refused to sign the freight prepaid bills of lading at that time.

On Friday, April 13, 1979 the potential liabilities of and between the parties became clear: Goodpasture wanted the sale to go through but could not effectuate payment under the letter of credit without proper documentation, including signed freight prepaid bills of lading; Negocios would not sign the ladings without obtaining payment under the terms of the charter party; and Empac, apparently for one or a combination of several reasons which will be noted *infra*, could not or did not effect pay-

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6. Although the charter party originally provided for a March 26, 1979 delivery, at trial the testimony indicated that Empac agreed to two extensions of the deadline, ultimately to March 30, 1979.

7. Prior to beginning the loading activity, and precipitated by Empac's failure to pay even the undisputed and owing portion of the advance charter hire, the vessel owner withdrew the charterer's authority to sign Bills of Lading.

ment to Negocios. On April 13, 1979, Goodpasture filed its original complaint against both the vessel *in rem* and against Negocios *in personam*, alleging that its cargo of grain had been tortiously converted. The legal stage was set.

II. *The Procedural History—An Overview*

Goodpasture filed its first amended original complaint on April 25, 1979, and with the exception of adding Empac as a named defendant, stated essentially the same cause of action as in its original complaint: that is, "in derogation of [Defendants'] express and/or implied agreements and undertakings, and contrary to law, Defendants did wrongfully refuse to issue bills of lading covering [the wheat cargo], and converted said cargo of wheat to their own uses and purposes." Goodpasture's First Amended Complaint at ¶ 6.

Both Empac and Negocios answered Goodpasture's complaint on May 29, 1979. Empac essentially denied the allegations in the complaint and asserted several personal defenses. Negocios, along with answering the complaint and filing its claim of owner to the ***POLLUX***, additionally filed a Third Party Complaint against the wheat cargo *in rem*, a Counterclaim against Goodpasture and a Cross-Claim against Empac. Negocios alleged that Goodpasture wrongfully seized the vessel on April 13, 1979 in view of the fact that Negocios had no obligation to issue freight prepaid bills of lading when "the freight had not been paid". As against Empac, Negocios sought recovery for the unpaid advance charter hire. The lien asserted against the cargo by Negocios was based upon a standard provision in the charter party that provided

the owner with a "lien upon all cargoes, and all sub-freights for any amounts due under this Charter . . .".[8]

On May 29, 1979, in response to Negocios' pleadings Goodpasture filed a claim of owner to the grain, asserting that it was at all relevant times the "true and bona fide owner of said cargo." Additionally Goodpasture filed an answer to the third party complaint and to the counter-claim, asserting the the seizure of the *POLLUX* was authorized in view of the vessel owner's conversion of the cargo.

On the same day, Negocios moved to lift the arrest of the vessel alleging as a basis therefor that the title to and risk of loss of the grain passed from Goodpasture to Empac as the grain exited the loading spout and entered the vessel's cargo holds. Since title to the grain cargo was

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8. During the period from April 13, 1979 to May 22, 1979, several options were explored by the parties in an attempt to resolve the controversy without litigation. These alternatives were explored in an attempt to obviate the expense attendant to the off-loading of the grain. As the prospects for resolving the issue grew dim, Goodpasture made its first written demand upon Negocios for the return of the grain on April 25, 1979. The hearing on Goodpasture's motion to discharge the grain was cancelled, however, when Goodpasture advised the Court that the differences between the parties had been settled. Court's Docket Sheet, Entry No. 6.

The passage of time, however, only served to compound the problems. For example, copies of some of the documents (including the bills of lading) required to be produced at the CNB in order to obtain payment under the Idema letter of credit were supposed to be forwarded to Idema within a certain number of days after the loading of the cargo. The time expended obtaining proper certification of the documents, however, prevented a timely forwarding of those documents to Columbia (a fact well known to the CNB since they had possession of the documents) and thus precluded the bank from paying under the letter of credit without express authorization from Idema's Columbian bank. In the final analysis, Idema refused to pay under the letter of credit, the deal fell through, and on May 23, Negocios withdrew from the charter party.

no longer in Goodpasture, so Negocios argued, Goodpasture's *in rem* conversion claim against the *POLLUX* was wrongful. Briefs were filed by the parties and a hearing was conducted on June 1, 1979. After reviewing the issue and being of the opinion that a further evidentiary hearing concerning Plaintiff's *in rem* claim against the vessel was necessary in order for the Court to rule upon Negocios' motion to lift the arrest of the vessel, a hearing was set for June 18, 1979[9] for the purpose of taking evidence and hearing argument concerning Plaintiff's *in rem* claim against the vessel.

Subsequent to the June 18 proceeding, this Court issued its findings of fact and conclusions of law, holding that Plaintiff's *in rem* claim against the vessel should be dismissed. By agreement of the parties and pursuant to Rule 54(b), a final judgment was entered dismissing Goodpasture's Complaint and lifting the seizure of the vessel. Concomitantly, a stay of this Order was issued pending appeal.[10]

Although the Fifth Circuit adopted this Court's findings of fact, the ultimate holding was reversed. *Goodpasture,*

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9. Prior to the June 18 proceeding, Negocios and Goodpasture jointly moved this Court to have the cargo of wheat discharged into the custody of Goodpasture. Goodpasture agreed to post security in an amount requested by Negocios but "reserved its right to have the Court determine the necessity for and the amount of any security at a later date". The Court granted the motion to discharge the grain, but was never requested to make a determination regarding the necessity for and amount of any security required to be posted by Goodpasture. Whether Goodpasture in fact posted such security has never been made a part of the records of this Court.

10. Negocios appealed the Court's order staying the release of the vessel pending Goodpasture's expedited appeal. In addition, Empac filed a notice of appeal of this Court's Order dismissing Goodpasture's Complaint. Empac's basis for appealing that order is, at best, obscure.

Inc. v. M/V Pollux, 602 F.2d 84, 86 (5th Cir. 1979). The dispositive appellate issue, as viewed by the circuit court was whether "the ship [had] a claim against Goodpasture to support the maritime lien it asserted against the ship's cargo of Goodpasture's wheat". *Id.* at 86. On the basis of this Court's finding of fact that title to the grain never passed from Goodpasture to Empac, *id.*, the circuit court held that Negocios' assertion of a maritime lien aganst the wheat cargo was wrongful, thus constituting a maritime tort of conversion, because any claim Negocios had for payment of charter hire under the charter party ran against Empac—not Goodpasture. *Id.* at 87. Accordingly, the case was reversed and remanded for further proceedings consistent with the Fifth Circuit opinion.

III. *The Issues Now Before This Court And Their Resolution*

A. *The Liability Between Goodpasture and Negocios—The June 18 Proceeding and the Fifth Circuit Reversal*

The parties are in substantial disagreement over the force and effect of the Fifth Circuit's opinion. Plaintiff Goodpasture argues that the June 18 proceeding was a trial on the merits, disposing of all issues of liability between itself and Negocios, and that the only issue remaining as between Goodpasture and Negocios is the damages recoverable by Goodpasture.[11] In support of this position, Goodpasture asserts that the legal conclusion drawn by the circuit court, which was based upon this Court's

11. The final judgment entered by this Court pursuant to Rule 54(b), as Plaintiff argues, certified that the judgment fully disposed of the issue between the *in rem* Defendant and the Plaintiff.

factual determination concerning the title to the wheat, is dispositive of all the liability issues between itself and Negocios, and accordingly, any legal or factual re-examination by this Court of the "title to the wheat" issue is precluded by the principles of *res adjudicata* and the law of the case.[12]

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12. Principal reliance is placed upon the Fifth Circuit's opinion in *Paull v. Archer-Daniels-Midland Co.*, 313 F.2d 612 (8th Cir. 1963). *Paull* involved a suit by a manufacturer to recover on promissory notes against certain turkey growers. The turkey growers counterclaimed for breach of contract to finance a turkey raising operation. The district court originally entered a judgment in favor of the turkey growers on the counterclaim and the manufacturer appealed. The Eighth Circuit reversed and remanded, 293 F.2d 389, holding that there was an insufficient factual and legal basis to sustain the damages award in favor of the turkey growers as regards their anticipated profits. On remand the district court entered a judgment in favor of the manufacturer on the promissory note, with the amount of the judgment being reduced by the damages found on the turkey growers' counterclaim. The counterclaimant's damages included an amount representing their loss of anticipated profits. The turkey growers appealed. Concerning the issue of whether the district court properly considered additional evidence submitted by the turkey growers on their loss of anticipated profits, the appellate court stated:

> By the plain and unambiguous wording of our prior opinion, the case was 'remanded for the ascertainment of whatever general damages may, under [the applicable law] and consistently with this opinion, be due to [the turkey growers] upon their counterclaim. By the mandate, no privilege was given to the appellants [counterclaimants] to introduce additional evidence relating to their right to anticipated profits as damages, or to have a "second hearing," or "new hearing," or "retrial" or "second trial" relative thereto—an issue which had been fuly litigated and finally determined. By its language this Court specifically defined the limit and scope of the remand.
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> Clearly, the submission and taking of testimony relative to the right of the [counterclaimants] to damages based upon loss of anticipated profits [at the second hearing], was contrary to both the letter and spirit of the mandate construed in the light of the opinion of this Court, and the trial court lacked power to make any effective finding based thereon. . . .

313 F.2d at 618. The Fifth Circuit, citing *Paull*, has similarly held that when certain dispositive factual issues have been finally decided

Negocios counters with the argument that the June 18 proceeding only disposed of the propriety of Goodpasture's assertion of a maritime lien against the *POLLUX* and did not fully adjudicate all the liability issues between these two parties. Specifically Negocios argues that the merits of its counterclaim against Goodpasture *in personam* and of its lien asserted against the cargo are now before this Court for a decision. In support of its position, Negocios asserts that to prevent the full adjudication on remand of its claim against the wheat *in rem* would be a denial of due process because that particular issue was not fully adjudicated at the June 18 proceeding. The factual issue underpinning Negocios' claim against the wheat *in rem*, however, to wit, the title to the grain, was fully decided at the June 18 proceeding and the appellate court

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by the circuit court, the trial court, on remand, is precluded from reexamining those issues except when the evidence on retrial is substantially different. *See National Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers*, 430 F.2d 957 (5th Cir. 1970).

The cases establish quite clearly that when the taking of additional testimony flies in the face of an express holding by the appellate court or is contrary to the spirit of the appellate court's mandate, viewed in light of its opinion, the trial court is forcelosed from reopening the issue so decided on appeal. The letter and spirit of the Fifth Circuit's mandate in this case is illuminated by the fact that the same arguments raised by counsel to this Court on remand, in an attempt to persuade this Court to reexamine the issue of the title to the grain, were presented to the Fifth Circuit in Negocios' Petition for Rehearing and Petition for Rehearing in Banc, and were rejected. The type of denial (Group 1) issued by the Fifth Circuit expressly denotes that, having reviewed the arguments presented by Negocios in its petition for rehearing, "no member of the panel nor Judge in regular active service on the Court requested that the Court be polled." 606 F.2d 321; *see* Fed. R. App. P. 35 and local Fifth Circuit Rule 12. Thus, no member of the Fifth Circuit felt that any of Negocios' arguments merited a reexamination. Viewed in this light, the letter and spirit of the Fifth Circuit as regards the issue of the title to the grain would appear to be foreclosed from reexamination by this Court.

has ruled on the legal consequences flowing from that factual determination.[13] Certainly this Court could not hold that even though Negocios converted Goodpasture's wheat, it may nonetheless maintain an *in rem* cause of action against that same cargo of wheat. Of necessity, this Court would have to reexamine the question of when title to the wheat passed from Goodpasture to Empac in order to reach a decision on Negocios' claim against the wheat or on its counterclaim against Goodpasture. This Court is now of the opinion that the letter and spirit of the Fifth Circuit's prior opinion in this case precludes a re-examination of that title issue.

In order to obviate the necessity of conducting yet another evidentiary hearing on the liability issues between Goodpasture and Negocios if this case were appealed and reversed, however, this Court decided that the most judicially economic course of action would be to couch the liability issue between Goodpasture and Empac in the context of a hearing in which Negocios was to show cause why a judgment should not be entered in favor of Goodpasture.[14] At this show cause hearing, which began on February 27, 1980, Negocios was permitted to go forward and submit evidence on the liability issue between itself and Goodpasture. The evidence did not alter this Court's thinking on the "title-to-the-grain" issue to such an extent so as to warrant a different outcome than was reached by this Court at the June 18 proceeding, even under the most

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13. It should also be noted that Negocios did not cross-appeal the "title to the grain" issue.

14. Additionally, Negocios was granted leave to file an amended counterclaim against Goodpasture, an amended cross claim against Empac, and an amended third-party complaint against the cargo of wheat *in rem*.

liberal of standards.[15] Accordingly, the liability issue be-

15. The parties agreed that the terms of the Texas Uniform Commercial Code apply to this sale of grain. Since the grain was identified to the contract involved herein pursuant to Tex. Bus. & Com. Code Ann. § 2.501 (Tex. UCC) (Vernon 1968), the terms of § 2.401 governed the passage of title. That section provides in pertinent part that:

> title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

Id. § 2.401(a). A "usage of trade," defined as "any practice or method having such regularity of observance in a place . . . or trade as to justify an expectation that it will be observed with respect to the transaction in question," *id.* § 1.205(b), should be read as "giving particular meaning to and supplement[ing] or qualify[ing] terms of an agreement," *id.* § 1.205(c). Comment Four to § 1.205 indicates that a trade usage governs over other rules set out in Article 2 of the UCC that might otherwise appear to govern the transaction:

> The latter rules [such as those in Article 2 on sales] hold "unless otherwise agreed" but yield to the contrary agreement of the parties. *Part of the agreement of the parties to which such rules yield is to be sought for in the usages of trade which give particular meaning to the language used, and are the framework of common understanding controlling any general rules of law which hold only when there is no such understanding.*

Id. (emphasis added) At the June 18 proceeding and the February 27 trial, Goodpasture produced three grain trading experts with a combined experience in the grain trade of 44 years. All three experts (Mr. Mendel at the June 18 proceeding and Messrs. Tracy and Friend at the February 27 trial) testified that the custom and usage in the grain trade was for the title to the grain to pass when payment is made, *i.e.* when funds had been credited to the account of the seller. Negocios' expert, Mr. Dailey, while testifying that title to the grain passed when the seller completed his performance by delivering the grain onto the vessel, also testified that an agreement between the parties to the contrary would govern over all else.

Even assuming arguendo that this Court is saddled with the obligation of reexamining the "title to the grain" issue, the evidence still weighs in favor of holding that the usage in the grain trade dictates that title to the grain in this type of case passes when payment is made. The interesting question, if title did in fact pass to Empac when the grain was loaded on board the vessel and Goodpasture retained only security interest in the grain pending payment, of whether Goodpasture could nonetheless assert a maritime lien against the vessel to protect that security interest, need not be addressed.

tween Goodpasture and the vessel *in rem*, as well as Negocios *in personam*,[16] insofar as this Court is concerned can finally be laid to rest: the wrongful exercise of dominion and control by the vessel and its owner over Goodpasture's grain beginning on April 13, 1979 constituted a maritime tort of conversion for which Negocios or the vessel must respond in damages to Goodpasture.

B. *The February 27 Trial and the Remaining Liability Issues*[17]

In addition to allowing Negocios an opportunity to place before the Court evidence concerning its claims against Goodpasture and against the cargo of grain on board the *Pollux in rem*, the February 27 trial provided

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16. Although this Court believes that Goodpasture's claims are sufficiently maritime in nature so as to give rise to a maritime lien against the vessel, *see* G. Gilmore & C. Black, The Law of Admiralty § 9-20, at 629 (2d ed. 1975), in view of the fact that it was the vessel owner who actually asserted control and dominion over the grain, the same facts that give rise to the vessel's liability *in rem* also lay the predicate for the vessel owner's liability *in personam*. *See Id.* §§ 9-18, 9-18(a) & 9-90 (1975). This is not a case in which the vessel owner appeared only to defend the *in rem* action asserted against the vessel as in *Stewart v. Steamer Blue Trader*, 428 F.2d 361 (1st Cir. 1970); but instead has vigorously pressed its claims against the wheat *in rem* and against both Goodpasture and Empac *in personam*.

17. In addition to the evidence submitted by all the parties at the trial that began on February 27, 1980, the other evidentiary materials considered by this Court in arriving at the final decision in this case included: (a) The evidence and exhibits submitted at the June 18 proceeding; (b) the evidence and exhibits presented at the August 20, 1979 hearing on the amount of security that Negocios was required to post in order to release the *POLLUX* from seizure; (c) the entire depositions of Messrs. Jerome Williams, Georgios Vatistas, Osvaldo Grzesik, Abraham Woll, Able Woll, David Mezias, Ian Reid, Olen White, James Thomas, and Capt. Juan Ortiz; and (d) the extensive briefs and memoranda (with attached cases) filed by the parties.

the final trial forum for the disposition of the liability issues between Negocios and Empac and between Negocios and two companies that had provided services to the vessel in Houston, Biehl & Co., Inc. and Suderman & Young.[18]

1. *Negocios, Empac and the Time Charter Party*

Negocios, the owner of the *M/V POLLUX*, entered into a time charter arrangement with Empac pursuant to the terms of a standard New York Produce Exchange Time Charter Party on March 20, 1979.[19] The Charter Party embodied three provisions that have particular relevance to this lawsuit. First, the *POLLUX* was to be presented to the charterers at the Port of Houston on or before March 30, 1979 at 4:00 p.m. Second, the charterers were obligated to pay 24 days advance charter hire at the rate of $7,550.00 per day upon delivery of the vessel at the port of origination. Third, the Master was obligated to authorize the charter or its agent to issue

18. The cause of action filed by Biehl & Co., Inc. and Suderman & Young against Empac and against the *POLLUX in rem* need not be decided by this Court. These two plaintiffs reached a settlement with Empac prior to trial. The Court was also advised by counsel for Negocios after the February 27 trial that a settlement had been reached between itself and both Biehl & Co. and Suderman & Young. Negocios requested, however, that its proposed findings of fact and conclusions of law be amended to provide the *M/V POLLUX* indemnity against Empac Grain Corp., Inc. for the amount of Negocios' settlement with Biehl & Co. and Suderman and Young. The merits of this issue will be discussed in the context of the liabilities arising out of the cross-claims of Negocios and Empac, *infra*.

During the February 27 trial, Goodpasture orally advised the Court that it was abandoning its claim against Empac. The liability issue between these two parties, therefore, needs no discussion.

19. The negotiations were conducted on behalf of the principals by their respective agents: Mr. Jerry Williams of Odin Marine for Negocios and Mr. Georgios Vatistas (affiliated with Woodbury Chartering) for Empac.

Bills of Lading so long as they were in accordance with mates and tally clerks receipts. Each of these provisions was breached and it is the effect of those breaches, viewed in light of the surrounding circumstances, that must determine the ultimate liability between these two parties.

As a general rule, when a party breaches the terms of a charter, the non-breaching party has two options: to withdraw from the charter or to excuse the breach (without abandoning any of its claims to a set-off from the total amount due) and continue with the charter. *See, e.g., Karran v. Peabody*, 145 F. 166 (2d Cir. 1906). *See generally* G. Gilmore & C. Black, The Law of Admiralty §§ 4-18 & 4-19 (2d ed. 1975). The vessel was approximately six days late arriving in Houston[20] but the vessel owner decided to go ahead and tender the vessel to Empac with the hope that another charter had not been arranged. Empac had made no other arrangements and accepted the vessel upon its arrival. Thus Empac elected to continue with the charter and both parties remained bound by its terms as of April 6, 1979.

From the time the vessel arrived in Houston on April 6, 1979, the vessel owners persisted in their demands that Empac effect payment for the first 24 days charter hire. Empac's agent, Mr. Vatistas, assured Negocios that the money had been transferred as per Negocios' instructions. Based upon these assurances, and upon Mr. Williams' belief that Empac would in fact pay the charter hire,[21]

20. See p. 5 *supra* for a discussion of the reasons the vessel was late presenting in Houston.

21. Mr. Williams did not find the delay in receiving the hire to be unusual because his experience in international banking transactions was that such transfers took longer than normal domestic transfers.

the vessel presented itself ready for loading on April 11, 1979. On that same day, the vessel owners had again received assurances from Empac that their money had been transferred. The loading was completed on April 12 at 1546 hours. Approximately 45 minutes later, having as yet to receive the advance charter hire, the vessel owner withdrew the charterer's authority to sign bills of lading.

At the February 27 trial, Mr. George Gonzalez, the individual who apparently was responsible for transferring the money for the charter hire from Argentina to the United States, testified that as early as April 10, 1979, he had become aware of certain banking regulations adopted by the government of Argentina that proscribed the international transfer of funds out of Argentinian banks. Empac or the person responsible for meeting Empac's fiscal obligations, knew that a timely transfer of funds to Negocios to meet Empac's obligations under the charter party would be impossible; yet Empac repeatedly assured Negocios that such funds had in fact been transferred. Empac's argument that Negocios should have withdrawn from the charter party when Empac did not pay the advance charter hire loses its force and effect when viewed in light of the fraudulent representations made to Negocios.[22] This Court cannot accept the notion of hold-

22. Empac cites several English cases for the proposition that upon the breach of the payment clause of the charter party by Empac, Negocios was obligated either "to withdraw the *POLLUX* from the service of the charterers or to continue with its obligations under the Charter Party." Empac's Post Trial Brief at 2 (citing *Federal Commerce and Navigation Ltd. v. Molena Alpha, Inc.*, (1979) 1 L.L.R. 201; *Steelwood Carriers, Inc. v. Evimeria Compania Naviera S.A.*, (1967) 2 L.L.R. 192; *Aegnoussiotis Shipping Corporation of Monrovia v. A/S Kristin Jebsens Redevi of Bergen* (1977) 1 L.L.R. 268; and *In re Arbitration Between Lone Star International Ltd. and Latin American Chartering*, Award No. 1151 (New York,

ing a party to the terms of a contract after having been frudulently induced to continue to perform thereunder. Were such a patently fraudulent representation never made in this case, the vessel owner would have in all likelihood never presented the vessel for loading and the wheat would have never been placed on board. It is no small wonder that Negocios proceeded with extreme caution in its dealings with Empac after the wheat was loaded on board and no money had been paid to Negocios.

Moreover, to hold Negocios liable to Empac for breach of the charter party based upon Negocios' refusal to execute freight prepaid bills of lading would be extremely inequitable.[22a] The law cannot be read to impose an obli-

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27 September, 1977)). Even if these cases were binding upon this Court, they would not directly support Empac's position in that none involve fraudulent representations made by the charterers for the purpose of inducing the vessel owner to continue performance under the charter party.

22a. A distinction must be drawn here between Negocios' *obligations* to perform under the charter party and Negocios' *options* it could have exercised to relieve it from liability vis-a-vis Goodpasture. The Fifth Circuit stated that Negocios' failure either to return that wheat to Goodpasture or to transport the wheat to its proper destination constituted conversion. Apparently, the Fifth Circuit, in stating that Negocios could have transported the grain without converting it, contemplated a course of action that Negocios could have pursued so as not to lose its security for payment of the charter hire. As a general proposition in admiralty law, "freight" is the compensation paid to the carrier (either owner or charterer) for the carriage of goods from one place to another. "Freight" is generally earned after the cargo has been delivered to its final destination. "Hire" is the compensation paid by the charterer to the owner for the rental of the vessel. When, as in this case, a charter carries the cargo of third parties aboard the owner's vessel, the charterer reserves a lien upon such cargo to secure the payment of freight and other charges. The vessel owner, in turn, has a lien on all charges and sub-freights for any amount due him under the charter party. The cargo owner who pays freight to the charterer in good faith without notice of the vessel owner's lien, however, is protected against the owner's lien

gation on a party to perform under a contract with respect to which that party has been fraudulently induced to continue performance thereunder. The duty of the non-breaching party to perform under such circumstances comes to an end from the time of the fraudulent mis-

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reserved in the charter party. *See, e.g. Tarstar Shipping Co. v. Century Shipline, Ltd.*, 451 F. Supp. 317, 324 (S.D.N.Y. 1978); *American Steel Bargo Co. v. Chesapeake & O. Cool Agency*, 115 F. 669 (1st Cir. 1902). *See generally* G. Robinson, Handbook of Admiralty Law §§ 56 & 82 (1939).

This Court assumes, without deciding, that Negocios could have signed the freight prepaid bill of lading and indicated thereon the reservation of its right to charter hire under the charter party. Simply signing the bill of lading as presented without such a notation, would have discharged Negocios' lien on the cargo for freight or subfreight because the ultimate consignee of the grain (Idema) had no notice of the lien and had already in good faith paid the freight charges on the cargo by establishing the irrevocable letter of credit. Whether this qualified signature of the bill of lading would have satisfied Empac's demand that the lading be signed "as presented" is a matter upon which no evidence was adduced. Empac, citing *Tarstar* argues that since an owner's "lien on freights and subfreights is nonpossessory, *cf. Beverly Hills Nat'l Bank & Trust Co. v. Compania de Navegacione Almirante, S.A.*, 437 F.2d 301, 304 (9th Cir.), *cert. denied*, 402 U.S. 996 (1971), and 'does not depend upon any right which the owner may have to proceed against the cargo or upon possession thereof, but upon the agreement of the party creating it'[,] *The Selhaug*, 2 F. Supp. 294, 299 (S.D.N.Y. 1931)[,] '[t]he shipowner need not detain or proceed against the cargo at all in order to enforce his lien [on freight or subfreight].'" *Tarstar*, 451 F. Supp. at 327-28. This process, however, contemplates the situation in which freight monies, although admitted due, have *not* been collected and can be brought into the Court for disbursement to the proper party. From the standpoint of Negocios in this case, however, there existed a substantial likelihood that Empac, upon receiving the signed bill of lading, would accept and pocket the freight monies, thus effectively precluding any hope that Negocios had to recover any charter hire from Empac.

The fact remains, however, that simply because Negocios may have had an alternative to returning the wheat to Goodpasture, Negocios was not *obligated* by the charter party to sign the freight prepaid bill of lading in view of the fraudulent circumstances surrounding Empac's breach as is discussed more fully in the text following this note.

representation. To argue that the non-breaching party should be required after the breach to perform the same act pursuant to the contract that the breaching party tried to induce the innocent party into doing by an act of fraud before, strikes no legal or equitable harmonious chords. Accordingly, Empac's argument that Negocios was bound by the charter party to execute the freight prepaid bills of lading in exchange for the assignment of proceeds from the Idema letter of credit pales under the light of the deposition testimony of the CNB officer, Mr. Ian Reid. Mr. Reid stated that on April 26, 1979, when Negocios finally signed the freight prepaid bills of lading,[23] his bank still could not pay under the Idema letter of credit without further instructions from the corresponding bank in Columbia.[24] In essence then, the failure of Empac to

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23. In an effort to make the sale go through, the parties explored several avenues of settlement. At one point in their negotiations, Negocios agreed to accept an assignment of proceeds from the Idema letter of credit in satisfaction of Empac's obligations under the charter party. The freight prepaid bill of lading was delivered to the CNB by Negocios with instructions not to give the lading to any party until payment of the charter hire had been effected.

24. The terms of letters of credit must be specifically met before a bank will authorize payment pursuant thereto. Even the most minor discrepancy between the documents as presented and the terms of the letter of credit will warrant the bank's refusal to pay. The terms of the letters of credit involved herein that were not met after the freight prepaid bill of lading had been signed included:

(a) The letter of credit called for all original documents to be mailed to Idema Buenaventura within ten days from the date of the Bill of Lading (i.e. April 25, 1979). Since the original bill of lading was delivered to the Miami bank on May 2, 1979, they could not have been delivered to Idema in accordance with the terms of the letter of credit.

(b) The letter of credit called for the grain to be weighed at the time of loading. The bill of lading stated that the grain was loaded on April 11, 1979, whereas the weight certificate was dated April 12, 1979.

(c) Only the first copy of the bill of lading was visaed by the

pay the advance charter hire timely, which Empac admits constituted a breach of the charter party, combined with Empac's fraudulent misrepresentations, dissolved any further obligations of Negocios to perform under the charter party. Accordingly, Empac's cross-claim against Negocios shall be dismissed and Negocios' cross-claim against Empac shall be granted. The damages to which Negocios may be entitled as a result of the breach will be discussed *infra*.

C. *Damages*

1. *The Conversion of Goodpasture's Wheat by Negocios*

The general rules governing the awarding of damages in a conversion action were set out in this Court's August 27, 1979 Memorandum and Order concerning the posting of security by Negocios with respect to Goodpasture's claims against the vessel *in rem*. In pertinent part, the Memorandum and Order stated:

> [T]he purpose of damages in a conversion case is to make the plaintiff whole again; that is, to compensate the plaintiff for the damages actually sustained as a result of the tortfeasor's wrong. *Standard Oil Co. v Southern Pacific Co.*, 268 U.S. 146 (1924); *American East India Corp. v. Ideal Shoe*

Columbian counsel whereas the letter of credit called for all copies to be visaed.

(d) The fumigation certificate did not indicate the duration of the fumigation as called for under the letter of credit.

(e) The Certificate of Quality was signed by the Superintendence Co. Inc. not by the General Superintendence Co. as called for by the letter of credit.

Any of these discrepancies would have authorized the bank to refuse payment under the letter of credit.

> *Co.*, 400 F. Supp. 141 (E.D. Pa. 1977), *aff'd*, 568 F.2d 768 (3d Cir. 1978).
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> * * *
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> In an action for conversion a plaintiff generally can recover the reasonable market value of the chattel converted at the time and place of conversion. *Herrington v. Texaco, Inc.*, 339 F.2d 814 (5th Cir.), *cert. denied*, 381 U.S. 915 (1964); Restatement (Second) of Torts § 222A (1965); 18 Am. Jur. *Conversion* § 82, 83 & 86 (1965).

Id. at 3-4. This analysis appears sound especially in light of the Fifth Circuit's recent recognition that, in analyzing a maritime tort case, general principles of negligence law govern. *See Daigle v. Point Landing, Inc.*, No. 77-2724 (5th Cir. May 8, 1980).

Additionally, in determining "market value," the Court must focus on the market to which the damaged party would resort in order to replace the subject matter. Restatement (Second) Torts § 911, Comment 6 (1965). To ascertain the precise nature of Goodpasture's damage claims an examination of the nature of Goodpasture's business and the relevant markets in which it operates is necessary.

Essentially, Goodpasture engages in the grain handling business: Goodpasture's customers pay a given "premium"[25] to Goodpasture in exchange for Goodpasture's elevating, grading and performing others services relative to the delivery of the grain to the common carrier. In

25. The testimony at the various hearings on Goodpasture's damages, *see* note 17, *supra*, established that the premium market for handling wheat constantly fluctuates in much the same manner as the commodities market. For example, just as the price of a commodity rises and falls in response to changing market conditions, so does the price for handling that commodity.

the typical transaction, as explained by Goodpasture's Vice President, Mr. Larry Steele, the customer purchases grain futures for the account of Goodpasture to enable Goodpasture to purchase the grain. Upon delivery of the grain to Goodpasture's elevators, and after Goodpasture elevates, grades and loads the grain aboard the carrier, the customer remits to Goodpasture an amount necessary to cover the flat price of the grain plus an amount commonly referred to as a "premium price", which compensates Goodpasture for its handling services. The "premium price" is expressed in cents per bushel relative to the flat price of the wheat.

To take a simplified example, a contract for the sale of a certain quantity of wheat at "74 cents over Kansas City May" would require the customer eventually to purchase, through Goodpasture, the requisite quantity of wheat at the May delivery price in Kansas City,[26] plus pay to Goodpasture 74 cents per bushel for the services provided by Goodpasture in facilitating the delivery of the grain to the carrier.

The grain that was the subject of the sale from Goodpasture to Empac was priced at "74 cents over Kansas City May." Of course, the sale was never consummated. After the grain was finally discharged from the *Pollux* on June 6, 1979, it was then regraded, reelevated, and sold to Dreyfus pursuant to a contract that provided for a 42 cents premium price.[27] During the interval from

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26. The price of grain futures are quoted at five different times during the year; *e.g.* March, May, July, September or December grain futures may be purchased.

27. That 42 cents per bushel was the prevailing market price for handling the grain at the time it was resold was not disputed at trial.

March to June, then, the premium market for grain handling decreased from 74 cents to 42 cents per bushel. In view of the fact that the grain itself has no value to Goodpasture or to any grain handler, the premium market must be the one to which this Court looks in order to determine the true measure of damages to Goodpasture. To make Goodpasture whole again and to fullfill the purpose of damages in a conversion action, initially this Court awards Goodpasture the difference between the premium market value of the Empac contract and the Dreyfus contract; that is, Goodpasture shall recover from Negocios the difference between 74 cents per bushel and 42 cents per bushel, or 32 cents per bushel. The Mates receipts show that a total of 700,620 bushels of grain were on board the *Pollux*, and thus Goodpasture's total recoverable loss of market is $224,198.40.

Before examining the remaining elements of Goodpasture's damages, the date that Negocios actually converted the wheat must be ascertained. Although this Court, as it must, considers itself bound by the legal conclusions and their factual underpinnings previously determined by the Fifth Circuit in the case,[28] the Fifth Circuit opinion is not a model of clarity with respect to the issue of the precise time at which Negocios converted Goodpasture's grain. The Circuit Court in pertinent part stated:

> It remains to consider whether *the seizure of Goodpasture's wheat by Negocios* as sercurity for its claims against Empac was a maritime tort giving rise to an *in rem* claim in Goodpasture against the

28. *See* 602 F.2d 84 (5th Cir. 1979) and pp. 9-12, *supra*.

> POLLUX. [Here the Court outlined the factual setting of *The Lydia*, 1 F.2d 18 (2d Cir. 1924) upon which it relied in part in reaching its decision]
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> * * *
>
> Our situation here is less aggravated, for the POLLUX did not sail but *merely asserted a claim in the nature of a maritime lien against the wheat.*

602 F.2d at 876 (emphasis added). Reading this language literally, it would appear that the date on which Negocios converted the grain would coincide with the date that Negocios filed the *in rem* claim against the grain: May 23, 1979. In view of the fact, however, that the case reached the Circuit Court as a result of this Court's dismissal of the Plaintiff's complaint, filed the day after the grain was fully loaded on board the vessel, the validity of Plaintiff's claim on that date, April 13, must have been the issue disposed of by the appellate court. It logically follows that in order for the Plaintiff to have a valid *in rem* claim on that date, actions by Negocios giving rise to that claim must have occurred on or before that date. With respect to those actions, the language of the Fifth Circuit opinion immediately preceding its specific holding is relevant:

> [T]he record is undisputed that Negocios had no intention of releasing the wheat to Goodpasture or anyone else until the charter hire was paid. Here was no puffery or negotiating bluff but a real and manifested claim on the wheat by one in actual possession of it at clear variance with the rights of its owners, one which has been manfully maintained until this day. Goodpasture indeed, only obtained discharge of the wheat by posting the very substantial security de-

> manded by Negocios. *We think these actions by Negocios were sufficiently at variance with the right to possession of the wheat by its owner, Goodpasture, to constitute conversion, . . .*

602 F.2d at 87 (emphasis added).

This wording, when viewed in connection with the procedural posture that the case assumed on appeal, gives the distinct impression that the conversion occurred at the time Negocios asserted dominion and control over the grain in contravention of the rights and interests of Goodpasture. Taken in any other manner, the Fifth Circuit's opinion reversing this Court's dismissal of Plaintiff's complaint for failure to state a valid *in rem* claim would make little sense. This Court, therefore, will consider the grain to have been converted as of April 13, 1979.[29]

Goodpasture additionally requests this Court to award damages in its favor as compensation for the expenses it incurred in discharging the grain, transporting it to another elevator, regrading it and reselling it in the amount

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29. An argument could be made, and in fact was made by Negocios, that the date and corresponding act on the part of Negocios that gave rise to Goodpasture's conversion claim was the refusal to release the wheat after the first written request for its discharge was made by Goodpasture on April 25, 1979. Goodpasture withdrew its request to have the grain discharged the following day, April 26, 1979. Under this theory, the conversion only lasted one day.

This Court, however, believes that the spirit, if not the letter, of the Fifth Circuit opinion dictates that the formality of a written request for the return of the grain was not the key event. Rather, the proper focus should be upon the time at which Negocios began its wrongful exercise of dominion and control over the grain. The precise time at which the conversion occurred and ceased, as well as the specific action on the part of Negocios that gave rise to Goodpasture's conversion claim is particularly important in assessing the propriety of the remainder of Goodpasture's damages.

of $246,905.89.[30] Goodpasture argues that when a plaintiff in a conversion action accepts or obtains return of goods in mitigation of damages, "the measure of damages is the diminution in market value plus expenses of recapturing the chattel and consequential damages resulting from its detention by the tortfeasor. *Colby v. Reed.* 99 U.S. 560 (1878); Restatement of Torts (Second) § 922, Comment b." Goodpasture's Trial Memorandum at 3. Even an expansive reading of the authority cited by the Plaintiff, however, does not support Goodpasture's claim for recovery of the recoupment charges herein.[31] The

30. Broken down, those expenses are as follows:

Stevedoring	$ 75,815.98
Truck Freight	28,561.02
Rail Freight	27,446.80
Demurrage	2,380.00
Bulk Plant Charges	48,037.04
Elevation	64,665.05
	$246,905.89

31. In *Colby*, the contracting parties arranged for the advancement of material aid by the defendant to finance the building of a railroad by Plaintiff. In exchange, Defendant accepted certificates of stock in the company for an amount in excess of the loan. Thereafter, several more advances were made by Defendant to Plaintiff. Relations between the parties eventually turned sour and the Plaintiff instituted a suit for the return of part of its stock. On appeal, the Supreme Court framed the issues presented as follows:

> Both parties agree that the controversy grew out of a contract between them, and that the redress sought by the plaintiff is compensation for the alleged breach of it and the failure of the defendant to comply with its terms. *Every pretense of conversion, therefore, may be dismissed in the outset without the least consideration, as there is nothing . . . which gives such a theory any support whatever. . . .*

99 U.S. at 563. Since the case did not involve a cause of action for conversion, it can hardly be cited as controlling authority to support a claim for the recoupment expenses incurred by Goodpasture in this case. The Court did make the passing note that in an action for conversion a defendant has the power to tender back the con-

grain was converted as of April 13, 1979—after the grain was loaded on board the vessel. The wrongful act giving rise to the conversion claim, in the words of the Fifth Circuit was Negocios' "refusal to carry or release" the grain. Presumably then, if Negocios had promptly returned or given up its claim against the wheat upon learning of Goodpasture's interest therein, no act of conversion would have occurred.[32] The recoupment expenses in that event would have been for the account of Goodpasture and would have been incurred regardless of whether Negocios converted the wheat. Admittedly, Negocios did convert the wheat, but that act of conversion did not give rise to the recoupment expenses that Goodpasture seeks to recover from the vessel owner. If anyone should be held responsible for those damages it should be Empac because of its failure to effect payment for the wheat even after Negocios agreed to accept an assignment of proceeds

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verted undamaged goods if such a tender "be accompanied with a tender of costs and intervening damages." *Id.* at 566.

The expenses of recapture incurred in this case are simply not the type that should be recoverable against the vessel owner. The record does not support, nor does the Fifth Circuit opinion hold, that Negocios converted the wheat by wrongfully enticing Goodpasture to place the wheat on board the *POLLUX*. If such were the case, the actions of the tortfeasor might logically and directly give rise to the expenses incurred by a plaintiff, and such expenses could possibly be assessed against the defendant. Negocios did not knowingly entice Goodpasture and load the grain aboard the vessel and accordingly should not be held accountable for the expenses of off-loading the grain.

32. The Court takes note of the fact that during the period that the negotiations were proceeding in an effort to make the sale of the wheat on board the *POLLUX* go through to Empac or someone else, all the parties represented to the Court, in at least one phone conference, that they did not want the grain to be discharged. This Court, in fact, stood ready to order the grain to be discharged during the early phases of this lawsuit, but did not do so in light of the requests made by the parties.

from the Idema letter of credit in exchange for signing the freight prepaid bill of lading. Goodpasture, however, orally dropped its claim against Empac during the February 27 trial. The recoupment expenses sought by Goodpasture shall therefore be disallowed.

The remaining elements of Goodpasture's damages, with one exception, are properly recoverable under the authorities cited by Goodpasture either as consequential damages as a result of the conversion or as court costs. Accordingly, those damages will be included in the judgment in favor of Goodpasture against Negocios.[33] The one cost that this court will not allow is that attributable to the "docking charges" incurred by the *POLLUX* while it was at Goodpasture's dock. Goodpasture asserts that because its tariff provides that charges shall be made for the use of its dock facilities and "[since] the POLLUX would have incurred similar dockage charges had it been elsewhere, Goodpasture is entitled to recover its own dockage charges." The evidence did not show that Goodpasture was ever prevented from docking a vessel be-

33. Those damages and costs include:

Costs	
Vessel dockage (Marshall)	$ 34,291.74
Vessel dockage (Bethlehem Steel)	56,038.00
Shifting expenses	28,722.93
Water to the vessel	800.00
	$120,452.67
Consequential Damages	
Interest	$ 56,223.93
Carrying charges	11,236.59
Dispatch	4,292.71
	$ 71,753.23
TOTAL	$192,205.90

cause of the presence of the *POLLUX* and, in fact, seeks recovery for the exenses associated with the shifting of the vessel when it was necessary. Since Goodpasture did not suffer any damage by virture of the vessel's sitting at the dock, this Court cannot permit such a cost to be recoverable as an element of damages in this case, and accordingly, that cost shall be denied.

Goodpasture, therefore, shall recover from Negocios as consequential damages and costs the sum of $192,205.90, the components of which have been outlined in note 33, *supra.*

2. *Damages recoverable by Negocios against Empac in personam*

As discussed earlier, Empac's failure to pay the twenty-four days advance charter hire constituted a breach of the Negocios/Empac charter party for which Empac, *in personam,* must respond in damages to Negocios.[34] Negocios, however, seeks damages from Empac based upon this particular breach far in excess of those contemplated by the law.

Negocios argues that it is "entitled to judgment against Empac for the breach of the charter party from the date it presented the vessel in Houston, Texas on April 6, 1979 until the vessel was released from seizure on September 10, 1979 in the total amount of $1,230,650.00 ($7,550 × 164 days) plus bunkers of $73,800.00 (1.5 tons per day at $300.00 per ton × 164 days)." Negocios

34. The character of the breach by Empac, when viewed in light of its attendant misrepresentations regarding payment, defeated the purpose of the charter party, thus affording a basis for Negocios to seek damages.

Trial Memorandum at 55.[35] The problem with this argument, however, is its inherent assumption that the detention of the vessel was solely attributable to the failure of Empac to pay the advance charter hire; that is, that the seizure of the *POLLUX* by Goodpasture was a direct and proximate result of the failure of Empac to pay Negocios. In light of the Fifth Circuit's as well as this Court's previous liability determinations, Negocios' damages cannot be sustained to the degree it requests.

The law is well settled that the appropriate measure of damages when a charterer breaches a time charter party is the net amount the vessel would have earned under the original charter party less the net amount actually earned during the period that would have been consumed by the vessel's performance or that could have been earned by reasonable diligence during such period. *See The Gazelle*, 128 U.S. 474, 487 (1888); *Ainesworth Coal & Iron Co. v. Trafikaktiedolaget Grangesberg Oxelosund*, 287 F. 291 (4th Cir. 1923); *Hildebrand v. Geneva Mill Co.*, 32 F.2d 343 (M.D. Ala. 1929). Accordingly, this Court must determine what the vessel could have earned during the period of the charter party if its owners had exercised reasonable diligence.

Although the testimony varied, the Empac/Negocios charter party reasonably would have run approximately

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35. Negocios also requests this court to award certain damages in its favor against the cargo *in rem* and against Goodpasture *in personam*. As fully discussed at pp. 9-14, *supra*, Negocios has no claim against the cargo *in rem* because title to the cargo never passed from Goodpasture to Empac and, accordingly, since the attendant seizure of the vessel by Goodpasture was valid, Negocios had no *in personam* claim against Goodpasture. Negocios, then, is not entitled to any damage award based upon either of these claims.

33 days.[36] At the rate of $7,550.00 per day, the total that Negocios would have earned, would equal $249,150.-00. Mr. Able Woll testified at the February 27 trial that, had the *POLLUX* been available during late April or early May, she could have been chartered at a rate far in excess of $7,550.00 per day.[37] Assuming that in the exercise of reasonable diligence Negocios could have secured a charter by April 20, 1979,[38] the vessel could have been on hire from that date through at least the contemplated term of the Empac charter, May 12, 1979, or a total of 23 days. Assuming further that the vessel could have been chartered at a rate somewhere between $10,000.00 and $11,000.00, the total amount that could have been earned during the remaining 23-day period of the Empac charter would approximately equal or exceed the total amount that would have been earned under the original charter party. Negocios cannot, therefore, obtain any recovery from Empac on a charter hire differential basis.

Negocios can and should, however, be able to recover its bunkers costs during the period between April 9, 1979 and April 20, 1979. Such a damage element is one that

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36. The vessel finally passed all inspections on April 9, 1979. Loading was completed on April 12, 1979 and, barring any unforeseen circumstances, reasonably could have reached its destination 30 days thereafter, May 12, 1979; thus the 33-day figure.

37. Mr. Woll testified that the charter market from the Gulf Coast to the West Coast of South America had strengthened such that vessels of the *POLLUX* variety were being chartered at as much as approximately $12,000.00 per day.

38. Because of Empac's misrepresentations that charter hire payment would be forthcoming, thus enticing Negocios to present the vessel for loading, it would be unreasonable to assume that Negocios could have begun its search for a new charter prior to April 13, 1979. Mr. Woll testified that it was his opinion that a charter could have been obtained at that time within one week.

would be considered reasonably to have been within the contemplation of the parties at the time they entered into the charter party. The bunkers cost during that 11-day period is calculated as follows: 1.5 tons per day at $300.-00 per ton × 11 days = $4,950.00.

The only remaining damage issue between these parties, then, is the extent to which Negocios should be indemnified by Empac vis-a-vis Negocios' liability to Goodpasture and to Biehl & Co. The Court was informed by counsel for Negocios that the Biehl & Co.'s *in rem* cause of action against the vessel had, for all practical purposes, been settled. Negocios, however, seeks indemnity from Empac for the amount of this settlement on the theory that Biehl & Co., who served as Empac's Houston agent, performed services[39] at the behest of Empac and accordingly, Negocios is only vicariously liable for the expenses associated with those services. This Court believes Negocios' argument on this issue is meritorious. The trial testimony clearly demonstrated that Empac had at one time agreed and in fact tendered a check to Biehl & Co. in partial satisfaction of those services, but Empac's check in the amount of $10,000 bounced. Presumably Empac had undertaken to have these services performed pursuant to its obligations in connection with the charter arrangement with Negocios. Empac, therefore, should indemnify Negocios in the amount of the settlement reached by Negocios with Biehl & Co. in connection with Biehl's *in rem* claim against the *POLLUX*.[40]

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39. The expenses associated with these services include those for pilots' fees, tug fees, and line handlers.

40. This recovery will, of course, be conditioned upon this Court's approval of the reasonableness of the settlement reached between Negocios and Biehl.

Whether to afford Negocios indemnity from Empac for the damages assessed against Negocios in connection with Goodpasture's conversion cause of action presents a more delicate question. On the one hand, Negocios argues that the expenses associated with the conversion would not have been incurred by the vessel or the vessel owner in the absence of Empac's misrepresentations regarding payment. Empac counters with the argument that it in no way caused the wheat to be converted by Negocios and that accordingly, Empac should not be compelled to answer for any damages associated with the conversion.

Negocios cited no authority, and this Court has vainly searched, to support a theory upon which to base Negocios' claim for indemnity against Empac. From a tort perspective, Empac could be considered no more than a passive contributor to the tortious conversion and the authorities have uniformly held in the maritime context that when joint tortfeasors are involved, the active tortfeasor cannot maintain an indemnity cause of action against the passive tortfeasor. *See, e.g. Wedlock v. Gulf Mississippi Marine Corp.*, 554 F.2d 240 (5th Cir. 1977); *Pasco Marketing, Inc. v. Taylor Towing Service, Inc.*, 554 F.2d 808 (8th Cir. 1977). In this case, Negocios was certainly the active tortfeasor when compared to Empac; Negocios, and not Empac, was the party who wrongfully asserted control over the wheat. Negocios also knew at the time it began the wrongful assertion of control that Goodpasture had a significant interest in the wheat. Based upon a tort theory, then, Negocios' claim for indemnity must be denied.

Although Negocios and Empac had entered into a contractual relationship with respect to this transaction, the evidence does not support a finding that its terms, either express om implied, the charter party affords any basis for indemnity in favor of Negocios for its own tortious acts. Accordingly, Negocios is not entitled to be indemnified by Empac for Negocios' tortious liability to Goodpasture.[41]

This Court concludes therefore that:

(1) Goodpasture's Motion for Judgment against Negocios is GRANTED;

(2) Goodpasture shall recover from Negocios the sum of $416,404.40;

(3) Negocios' Motion for Sanctions against Empac is DENIED;

(4) Negocios shall be indemnified by Empac for the amount of the settlement reached between Biehl & Co. and Negocios in connection with H-79-890; and

(5) Empac shall take nothing of Negocios.

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41. The motions that were carried along with this case and not specifically discussed herein, to wit:

(a) Negocios' Motion to Reconsider Framing the February 27 trial as a show cause hearing; and

(b) Goodpasture's and Empac's Motions for this Court to Reconsider its Order of January 16, 1980 allowing Negocios to file various amended counterclaims and crossclaims,

have been duly reconsidered by the Court and their resolution should be apparent from the holdings contained in this Memorandum. To avoid confusion, however, this Court stands by its original rulings—the February 27 Trial, as regards the liability issues between Goodpasture and Negocios, remains characterized as a show cause hearing, and Negocios' Motion for leave to file its amended counterclaims and crossclaims remains granted.

Counsel for Goodpasture, Inc. shall draft a Judgment in accord with this Memorandum and Order and submit it to this Court for signature after having other counsel approve such judgment as to form.

Signed this 11th day of June, 1980.

/s/ ROBERT O'CONOR, JR.
Robert O'Conor, Jr.
United States District Judge

APPENDIX L

GOODPASTURE, INC., Plaintiff-Appellee
Cross-Appellant,

v.

M/V POLLUX, ETC., Defendant-Appellant
Cross-Appellee,

and

NEGOCIOS DEL MAR, S.A., etc., Defendant-Third
Party Plaintiff-Appellant Cross-Appellee,

v.

EMPAC GRAIN CO., etc.,
Defendant-Appellee,

and

A Shipment of Wheat of 19,067.949 Metric Tons, etc.,
Third-Party Defendant-Appellee.

NO. 80-2216.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

Oct. 12, 1982.

Following remand, 602 F.2d 84, the United States District Court for the Southern District of Texas, Robert O'Conor, Jr., J., awarded damages to seller of wheat who had brought in rem action against vessel in which wheat was to be shipped, claiming that assertion of maritime lien against cargo was improper, and rejected counter-claims against seller, and appeals were made. The Court of Appeals, Politz, Circuit Judge, held that:

(1) issue of title to grain was not left open by prior opinion of Court Appeals; (2) finding of damages in amount representing difference between amount seller was to receive for its services and amount ultimately received pursuant to subsequent sale was not clearly erroneous; and (3) findings regarding consequential damages were proper, except for adjustment of award of carrying charges to reflect testimony.

Judgment modified and, as modified affirmed.

Appeals from the United States District Court for the Southern District of Texas.

Before COLEMAN, POLITZ and GARWOOD, Circuit Judges.

POLITZ, Circuit Judge:

We again address the claims arising out of an aborted sale of approximately 20,000 metric tons of number two hard red winter wheat. The factual setting of this involved dispute is essentially detailed in our prior opinion, *Goodpasture, Inc. v. M/V POLLUX*, 602 F.2d 84 (5th Cir. 1979). On remand, additional facts were developed. Subject to one minor modification, we perceive no clearly erroneous factual finding and find no error of law in the trial court's disposition. Accordingly, we modify and affirm.

Goodpasture, Inc., a Texas corporation engaged in wheat transactions, contracted with Empac Grain Corporation, Inc., a New York corporation, for the sale of the noted quantity of wheat. Empac was to acquire the wheat for Idema, a Colombian governmental entity. The agree-

ment ultimately negotiated provided for payment to Goodpasture under an assignment of proceeds of an irrevocable letter of credit established for Empac by Idema. Goodpasture was designated as Empac's agent to gather the documents necessary for payment under the letter of credit.[1]

Empac entered into a time charter party with Negocios del Mar, S.A., a Peruvian shipping concern, for the M/V POLLUX, which was to transport the grain from Houston, Texas to Buenaventura, Colombia. After certain delays and difficulties which are not of immediate relevancy, the vessel arrived and Goodpasture loaded the grain. The ship's master, acting under revised instructions from the owner, insisted on payment consistent with the charter party and refused to sign freight prepaid bills of lading. Without that documentation, Goodpasture could not effect payment under the letter of credit. Goodpasture had loaded its wheat aboard the POLLUX, the vessel was prepared to depart, but Goodpasture, obligated to pay its vendor for the wheat, could not secure payment. Goodpasture filed an *in rem* suit resulting in the arrest of the vessel, later amended to seek personal judgment against Empac and Negocios.

Shortly after the seizure, Goodpasture moved for discharge of the grain. Several weeks later, after due hearing and the posting of security as demanded by Negocios, the grain was removed from the POLLUX. The district court initially concluded that the refusal by Negocios to sign freight prepaid bills of lading did not constitute conver-

1. The letter of credit required: (i) commercial invoice, (ii) bill of lading, (iii) certificate of weight, (iv) phytosanitary certificate, (v) certificate of analysis, (vi) certificate of inspection, and (vii) certificate of origin.

sion of the wheat and that Goodpasture had no *in rem* rights against the vessel. The district court ordered the seizure released and Goodpasture's suit dismissed. On appeal, we reversed and remanded. 602 F.2d 84. The district court had found that title to the grain had not passed from Goodpasture to Empac. Consistent therewith, we held that the POLLUX had no claim against Goodpasture to support the maritime lien it had asserted against the cargo composed exclusively of Goodpasture's wheat. We further held that Negocios' seizure of Goodpasture's wheat as security for its claim against Empac was a maritime tort which gave rise to Goodpasture's *in rem* claim against the POLLUX.

On remand, the district court, because of Negocios' contention that further litigation as to the title to the wheat was not foreclosed by our decision, held evidentiary hearings at which Negocios was permitted to offer evidence relative to the title issue. Thereafter the district judge, in a scholarly, detailed and comprehensive opinion, found and concluded that, assuming the law of the case doctrine did not preclude further consideration of the title issue, the additional evidence supported and confirmed the conclusion that the POLLUX had exercised wrongful dominion over Goodpasture's wheat. Damages were awarded to Goodpasture, and counterclaims against Goodpasture and the cargo of wheat were rejected.

Title to the Wheat

[1] As a general rule, "a decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court. . . ." *White v. Murtha*, 377 F.2d

428, 431-432 (5th Cir. 1967). An exception to this rule arises when " '[1] the evidence on a subsequent trial was substantially different, [2] controlling authority has since made a contrary decision of the law applicable to such issues, or [3] the decision was clearly erroneous and would work manifest injustice.' " *Morrow v. Dillard*, 580 F.2d 1284, 1290 (5th Cir. 1978) (*quoting from White v. Murtha*, 377 F.2d at 432).

[2-4] Negocios' primary argument is that our prior opinion erroneously interpreted the provisions of the Texas Uniform Commercial Code[2] with respect to passage of title. An examination of the Texas U.C.C. quickly reflects that parties may control passage of title as between themselves by contractual agreement.[3] Tex. Bus. & Com. Code Ann. tit. 1, § 2.401(a) (Vernon); J. White & R. Summers, Uniform Commercial Code at 139 (1980). *See Heinrich v. Wharton County Livestock, Inc.*, 557 S.W.2d 830 (Tex. Civ. App. 1977). Moreover, as the district court noted, a "usage of trade," defined as "any practice or method of dealing having such regularity of observance in a place . . . or trade as to justify an expectation that it will be observed with respect to the transaction in question," Tex. Bus. & Com. Code Ann. § 1.205(b) (Vernon), should be read as giving "particular meaning to and supplement[ing] or qualify[ing] terms of an agree-

2. The parties agreed that the terms of the Texas Uniform Commercial Code applied to this sale of grain.

3. Negocios argues that under *Matter of Samuels & Co., Inc.*, 526 F.2d 1238 (5th Cir. 1976) (en banc), we must find that title to the grain passed to Empac at the time of delivery. The issue in *Samuels* involved the question of title as between the seller and a holder of a perfected security interest. Here, only the buyer and the seller, with an explicit agreement concerning passage of title, are involved in the critical dispute.

ment." Section 1.205(c).[4] We affirmed the district court's finding that the custom and usage in the grain trade called for title to pass upon payment and that Empac and Goodpasture had agreed to this arrangement. Our earlier opinion does not fall within the clearly erroneous exception. Concluding that the other exceptions are inapplicable, we are constrained to conform to the law of the case rubric and decline further review of this claim.[5]

Measure of Damages

[5-8] The district court awarded Goodpasture damages in the amount of $224,198.40, representing the difference in the amount Goodpasture was to receive for its services under the Empac contract and the amount ultimately received pursuant to a subsequent sale to Dreyfus Corporation. In reaching this conclusion, the court referred to the basic principles that damages in a conversion action should compensate for the loss actually sustained as a result of the tortfeasor's wrong, *Standard Oil Co. v. Southern Pacific Co.*, 268 U.S. 146, 45 S.Ct. 465, 69 L.Ed. 890 (1924), and a plaintiff may generally recover

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4. For further discussion of the importance of trade usage in illuminating the terms of an agreement, *see* Comment Four, Tex. Bus. & Com. Code Ann. tit. 1, § 1.205 (Vernon).

5. Negocios offered evidence on remand which attempted to show that Goodpasture was acting only as a representative of Empac in retaining the documents of title, that Goodpasture is estopped from claiming it is the owner of the grain, that Empac and Goodpasture were joint owners of the cargo, and that Goodpasture and Empac breached a contract with Negocios. As we stated in *National Airlines, Inc. v. International Ass'n of M. & A. W.*, 430 F.2d 957, 960 (5th Cir. 1970), "[t]he exception to law of the case where 'evidence on a subsequent trial [is] substantially different' is inapplicable where by the prior appeal the issue is not left open for decision." The issue of title to the grain was not left open by our prior opinion. The issue is foreclosed.

the reasonable market value of the goods converted, as of the time and place of conversion, *Harrington v. Texaco, Inc.*, 339 F.2d 814 (5th Cir.), *cert. denied*, 381 U.S. 915, 85 S.Ct. 1538, 14 L.Ed.2d 435 (1964); Restatement (Second) of Torts § 222A (1965). In determining market value, the court must focus on the market to which the damaged party would resort in order to replace the subject goods. Restatement (Second) of Torts § 911, Comment 6 (1965).

The district court applied these principles to Goodpasture's claims. It found Goodpasture engaged in the grain handling business, routinely receiving payment from its customers for elevating, grading and performing other services involved in the delivery of grain to a common carrier. Typically, Goodpasture would be compensated for its services through the payment of a premium over and above the market price of wheat. The record reflects, and the district judge so found, that this premium market fluctuated in the same manner as the commodities market itself.

The district court credited the testimony of Robert Steele, executive vice-president and general manager of Goodpasture, explaining his company's method of operation. Steele testified that in a typical transaction a customer would acquire grain futures for Goodpasture's account, enabling Goodpasture to purchase the grain. When delivered, Goodpasture would elevate, grade and load the grain upon a designated carrier and would be paid a sum equal to the "flat" price of the grain and the premium agreed upon for Goodpasture's services.

In the case at bar, Goodpasture contracted to sell Empac 700,620 bushels of wheat, priced at "74 cents over

Kansas City May." This contract obligated Empac to pay Goodpasture, after the wheat was elevated, graded and loaded, the amount of the May quotation for delivery in Kansas City plus 74 cents per bushel for Goodpasture's services.[6] The sale was never consummated and payment was never made.

After the collapse of the Goodpasture/Empac transaction and the discharge of the grain from the POLLUX, Goodpasture sold the wheat to another purchaser under a contract which provided for a premium of 42 cents per bushel. There is no dispute in the record that the prevailing premium for handling grain at the time of the resale was 42 cents per bushel. Finding that the flat price of the wheat was not the relevant factor in computing loss, that factor typically being a wash-out, the district court awarded Goodpasture damages composed of the difference between the amount of the premium payment it would have received under the Empac contract and the amount actually received in the subsequent sale.[7]

Negocios contends that the district court erred in finding that Goodpasture actually suffered a loss as a result of the conversion because the wheat was subsequently sold at a higher flat rate than the amount which was to be paid by Empac. Specifically, Goodpasture had contracted to sell the wheat to Empac for $3.92½ per bushel and actually sold it for $4.40 per bushel. Negocios argues

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6. Grain futures are priced, quoted and may be purchased for five different months—March, May, July, September and December. Quotations also relate to points of delivery.

7. Goodpasture's contract with Empac provided a premium of 74 cents; the later sale produced a premium of 42 cents. The difference, 32 cents, times 700,620 bushels, reflects damages for this item totaling $224,198.40.

that Goodpasture actually profited from the conversion and only incurred losses, if any, on the futures market because it traded futures to hedge its position during the controversy. The surface appeal of this contention fades upon closer examination of the record.

All of the testimony offered throughout this extended litigation supports the district court's finding of fact as to the relevant market for determining Goodpasture's loss.[8] The amount of damages is a factual issue, vulnerable on appellate review only if shown to be clearly erroneous. *Todd Shipyards Corp. v. Turbine Service, Inc.*, 674 F.2d 401 (5th Cir. 1982). The trial judge is accorded great latitude in awarding damages. *Drake v. E. I. Dupont de Nemours & Co., Inc.*, 432 F.2d 276 (5th Cir. 1970). *See Socony Mobil Oil Co., Inc. v. Texas Coastal & Intern., Inc.*, 559 F.2d 1008 (5th Cir. 1977).

We cannot label as clearly erroneous the district court's finding that Goodpasture was in the business of handling

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8. The parties agreed that testimony adduced at the hearing on the discharge security could be used on trial of liability. This included two witnesses called by Goodpasture, Robert Steele and Frank Hammond, general manager of Cargill, Inc., a competitive grain handling firm. Steele testified that the relevant market was the futures market and the premium reflected. Hammond testified that Goodpasture's actions under the circumstances were prudent and he confirmed Steele's market loss calculations.

No testimony was offered on remand to support the flat price theory now pressed on appeal. Negocios called Steele as an adverse witness and offered the testimony of R. P. Daly, a grain trading expert. Daly offered no guidance as to how to measure damages, but he found prudent the action of Goodpasture using futures as a hedge when the Empac sale collapsed. Goodpasture called an executive with Dreyfus Corporation, the ultimate purchaser of the grain, who corroborated Steele's testimony, and also called a supportive grain broker and grain trader. Empac called George Vatistas, a shipping consultant who had been Empac's agent during the transaction. Neither Vatistas nor the two witnesses offered by Negocios addressed damages.

grain and received a premium for each bushel sold in recompense for its services; or the finding that under the Empac contract it would have received a premium of 74 cents per bushel; or that Negocios' conversion interrupted the sale to Empac; or that in the resulting substitute sale Goodpasture received a premium of 42 cents per bushel. Because of the uncertainty of getting the grain off the POLLUX, and the pressing need to pay for that grain, Goodpasture had to hedge its position by selling futures at a lower premium price. The district court's finding that the difference between the lower 42 cents over price and the original 74 cents over price is the proper measure of damages is likewise not clearly erroneous.[9]

Consequential Damages

Negocios challenges several specific elements of damages awarded Goodpasture. Error is alleged in the district Court's award of consequential damages for interest in the amount of $56,223.90, carrying charges in the amount of $11,236.59, dispatch charges of $4,292.71, and shifting expenses of $20,562.08.

[9] *Interest.* When the Empac sale cratered and Goodpasture could not remove the grain from the POLLUX, it became necessary for Goodpasture, who still owed for the grain to borrow funds to pay for it. Interest totaling $56,223.93 accrued on this loan. The district court found

9. Negocios also contends that the district court erred in calculating damages because Steele had testified at the August 1979 hearing that Goodpasture's loss on the futures market was 29.4 cents per bushel, not 32 cents per bushel. A review of that testimony reveals some ambiguity. However, the record is replete with evidence that the original contract price was 74 cents over, and the grain was ultimately sold for 42 cents over.

this cost to be a recoverable item of damages. Negocios argues that because Goodpasture ultimately sold the wheat at a profit, the costs of financing the payment for the grain while it was on board the POLLUX should not be recovered. We are not persuaded. The interest charges are recoverable as an expense incurred in mitigation of damages.

[10] *Carrying charges.* The trial judge awarded Goodpasture $11,236.59 for carrying charges. This sum represents the amount Goodpasture would have collected had the contract been consummated and, as such, is a recoverable item. However, Steele testified that these charges totaled $4,904.34.[10] This item of damages must be adjusted accordingly.

Dispatch. The district court awarded $4,292.71 for dispatch, the amount Goodpasture would have collected from Empac for completing the loading within the allotted time. The conversion prevented collection of this sum.

[11] *Shifting expenses.* Negocios challenges the award of $20,562.08 for expenses incurred in moving the POLLUX into and out of the discharging berth during the period in question. This expense was found to be a recoverable item of damages. We perceive no reversible error in this finding.

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10. Steele testified about all items of damage sustained by Goodpasture, including the carrying charges.

Q. The last item?

A. Sixteen is carrying charges, $4,904.34. Under the contract terms the vessel came into our berth and filed late, and for us to hold the grain at our elevator while the vessel is late, the contract calls for carrying charges. Had the contract gone through, we would have collected carrying charges.

Finally, as to Goodpasture, we affirm the allowance of pre-judgment interest. *Socony Mobil Oil Co., Inc. v. Texas Coastal & Intern., Inc.*, 559 F.2d 1008 (5th Cir. 1977).

Negocios v. Empac

Negocios assigns error in the district court's calculation of its damages for breach of the charter party. We find no merit in the contentions urged. The district court's award of damages against Empac is affirmed.

The judgment of the district court as to the element of carrying charges is adjusted from $11,236.59 to $4,904.34, and as MODIFIED, the judgment of the district court is AFFIRMED.

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-2216

(Filed Nov. 22, 1982)

GOODPASTURE, INC., Plaintiff-Appellee
Cross-Appellant,

v.

M/V POLLUX, ETC., Defendant-Appellant
Cross-Appellee,

and

NEGOCIOS DEL MAR, S.A., etc., Defendant-
Third Party Plaintiff-Appellant Cross-Appellee,

v.

EMPAC GRAIN CO., etc.,
Defendant-Appellee,

and

A Shipment of Wheat of 19,067.949 Metric Tons, etc.,
Third-Party Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion October 12,, 1982, 5 Cir., 198__,
___F.2d___).

(November 22, 1982)

Before COLEMAN, POLITZ and GARWOOD, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ HENRY A. POLITZ
United States Circuit Judge

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-79-770

(Judge O'Conor)

(Filed Apr. 26, 1979)

GOODPASTURE, INC.

v.

M/V POLLUX, et al.

MOTION CONFERENCE BEFORE
H. LINGO PLATTER, U.S. MAGISTRATE

Requesting counsel: Michael Sydow and Marion McDaniel, (Plaintiff).

Other counsel of record and party represented: Ben Reynolds and Gene Sellars, (Defendant).

Motion(s): Discharge Grain.

Date/Time of conference: 4-24-79, 4:00 p.m.

Defendant Negocios de Mar is owner of vessel which received cargo of wheat from Plaintiff Goodpasture. Empac Grain Co. is charterer which purchased wheat. When bills of lading were not issued for the wheat, Goodpasture seized the vessel, and now seeks to discharge the grain to avoid contamination and deterioration of the grain.

After hearing arguments, the hearing this date was recessed until April 27 at 2:00 p.m. so that counsel may contact Empac Grain as to its position.

April 26, 1979—Secretary for counsel of Plaintiff advises that differences had been settled. Hearing cancelled.

/s/ H. LINGO PLATTER
United States Magistrate

4-26-79
Date Order Entered

NO. 82-1398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

M/V POLLUX, HER ENGINES, TACKLE, APPAREL, ETC., IN REM AND NEGOCIOS DEL MAR, S.A.,
Petitioners

v.

GOODPASTURE, INC.,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 82-1398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

M/V POLLUX, HER ENGINES, TACKLE, APPAREL, ETC., IN REM AND NEGOCIOS DEL MAR, S.A.,
Petitioners

v.

GOODPASTURE, INC.,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petitioner's statement of the case contains numerous assertions not supported by any finding of fact made by the District Court. Rather than correcting these errors one by one, Respondent submits the following statement drawn from the District Court's Findings of Fact and Conclusions of Law, and from the opinions of the Fifth Circuit Court of Appeals.

In February of 1979, Respondent Goodpasture agreed to sell 20,000 metric tons of wheat (10% more or less at

buyer's option) to Empac Grain Company. Under the terms of the sale Respondent was to load the grain into a vessel to be named by Empac. Empac agreed that Respondent would retain ownership of the grain until the purchase price was paid.

In March, 1979, Empac chartered the Petitioner's M/V POLLUX to carry the grain from Houston to South America. Respondent was not in any way privy to the dealings between Empac and Petitioner. On April 11 and 12, 1979, the POLLUX was loaded at Respondent's Houston facility. On the evening of April 12, Petitioner's Chief Executive Officer, Abel Woll, told Respondent that Petitioner was asserting a possessory lien against Respondent's grain, holding the grain as security for debts allegedly owed by Empac.

The following day, April 13, 1979, Respondent commenced this action against the M/V POLLUX, *in rem* and Negocios del Mar, *in personam*, for conversion and for wrongful refusal to issue a bill of lading. Petitioner filed a Third Party Complaint against the cargo of wheat, *in rem*, alleging that it had a possessory lien against the wheat to secure Empac Grain Company's indebtedness.

Petitioner also moved to dismiss Goodpasture's suit, and to lift the arrest of the POLLUX alleging that Goodpasture was not the owner of the grain. Petitioner requested and was granted a hearing on its motion to dismiss. The hearing was held on May 30, 1979. At that hearing, both Petitioner and Respondent agreed that Petitioner's claims against the wheat were not in issue, but only Goodpasture's ownership of the grain. The Court then, at Petitioner's urging, set the case for trial to deter-

mine the ownership of the grain and Respondent's right to maintain the arrest of the POLLUX.

The trial was held on June 19, 1979. Prior to the trial the District Court informed the parties that the facts found that day would be res judicata throughout the remaining course of litigation. At issue was the question of ownership of the grain. Petitioner contended that title to the grain passed from Respondent to Empac when the grain was loaded in the POLLUX, that Respondent did not own the grain and was not entitled to sue for conversion of the grain. Respondent countered with evidence establishing that its ownership was to continue until Empac paid for the grain. Since Empac never paid, the grain remained Respondent's property.

On June 20, the District Court filed findings of fact and conclusions of law establishing that Respondent did indeed own the grain in the POLLUX. The Court concluded, nevertheless, that Respondent had no cause of action against Petitioner or its vessel and ordered the POLLUX released. On June 22, the District Court entered a Final Judgment in favor of Petitioner.

Respondent obtained a Stay of the District Court order releasing the POLLUX and appealed the Final Judgment to the Fifth Circuit Court of Appeals. In September of 1979, after briefing and oral argument, the Fifth Circuit reversed the District Court's judgment. The Fifth Circuit held that Respondent owned the grain in the POLLUX and that Petitioner converted Respondent's grain. *Petitioner never sought a writ of certiorari from that decision.*

On remand, Petitioner attempted to persuade the District Court to re-try the issue of ownership of the grain.

The District Court refused, holding that the issue had been resolved in the prior trial and appeal. To avoid another remand after appeal, however, the Court allowed Petitioner to introduce all the evidence it had concerning ownership of the grain. The District Court then weighed Petitioner's evidence under what the Judge himself characterized as "the most liberal of standards." (District Court's Memorandum and Order of June 11, 1980 at p. 13, reproduced at p. 49a and 50a of the Petition for Writ of Certiorari). Despite the fact that Petitioner was given the benefit of every doubt, the District Court again concluded that Respondent owned the grain and Petitioner converted it.

On appeal, the Fifth Circuit refused to reexamine the ownership-of-the-grain issue, holding that its 1979 decision constituted the law of the case. Judgment in Respondent's favor was affirmed.

Petitioner now asks this Court to review the case contending:

1. That the Petitioner was denied due process under the Fifth Amendment because it did not realize that the District Court was resolving the issue of ownership of the grain on June 18, 1979;
2. That the District Court's June 22, 1979 Final Judgment was not really a *final* judgment, so that the "law of the case" doctrine should not be applied to the ensuing appeal;
3. The Fifth Circuit's 1979 decision was wrong as a matter of law.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

Petitioner's Reasons 1 and 3 cannot provide a basis for granting a writ of certiorari because the Petition for Writ on those grounds is not timely. A Petition for Writ of Certiorari to hear Petitioner's complaints concerning alleged denial of due process in the June 18, 1979 District Court proceedings should have been filed no later than ninety days after the Fifth Circuit's 1979 decision. The same is true of Petitioner's grievance arising out of alleged mistakes of law in the Fifth Circuit's 1979 decision.

Moreover, Petitioner's present argument (that it did not know what issues were being tried on June 19, 1979) is completely contradicted by its written representations made to the Fifth Circuit Court of Appeals, wherein Petitioner admits that it knew the June 18 proceedings were a trial on the merits. Petitioner's admission in this regard also defeats its Reason 2 for granting Writ of Certiorari for, since all the parties and the Court have agreed that the June 18, 1979 proceeding was a trial, and since it resulted in a final judgment, the Appellate Court's decision on appeal from that judgment constitutes the law of the case.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI WAS NOT TIMELY FILED.

Petitioner cites three grounds for granting certiorari. The first relates to alleged constitutional defects in the June 18, 1979 trial. Petitioner contends that it was denied

due process because it did not know that the June 18 proceeding was a trial on the merits. The third relates to an alleged mistake of law in the ensuing 1979 appeal to the Fifth Circuit. Petitioner's request for certiorari on these points is untimely.

The Fifth Circuit's decision in the 1979 appeal was issued in September of 1979. Petitioner's Motion for Rehearing was denied, and the Court of Appeals' mandate was issued on October 26, 1979.

28 U.S.C. § 2101 provides that, in a civil action, writ of certiorari shall be applied for within ninety days after entry of the judgment to be reviewed. Thus, this petition for certiorari filed in February of 1983 cannot subject the Fifth Circuit's 1979 opinion, or the issues resolved therein, to review.

II. PETITIONER WAS NOT DENIED DUE PROCESS IN THE JUNE 18, 1979 PROCEEDINGS.

A. Petitioner put ownership of the grain in issue.

The Petitioner itself defined the issues to be resolved in the June 18, 1979 proceedings. It framed those issues in the following language, contained in Petitioner's Motion to Lift Arrest at page 2:

> "The contract reveals that title to the cargo of wheat passed from Plaintiff (Goodpasture) to Empac Grain Company 'exspout' or at the time the cargo left the spout of the grain elevator. Empac became the owner of the goods at the time the cargo was loaded onto the M/V POLLUX. Consequently, Plaintiff has no right to maintain an action for conversation (sic)

> against Defendants because only the owner of goods may maintain an action for their conversion."

The Motion is attached as Appendix A.

The District Court held a hearing on Petitioner's Motion to Lift Arrest on May 30, 1979. After hearing the arguments of counsel, the Court felt that there were fact issues to be resolved before it could decide who owned the grain. Petitioner then urged the District Court to schedule a trial of that issue as soon as possible. The District Court, over Respondent's objection, obliged the Petitioner and scheduled the trial for June 18, 1979.

B. Petitioner has judicially admitted that it knew the June 18 proceeding was a trial on the liability issues, *and has further admitted that the June 18 trial was scheduled at its request.*

Petitioner's brief to the Court of Appeals in this case contains, at page 3, the following statement concerning the June 18, 1979 proceedings:

> "The shipowner (Petitioner) *moved for and was granted a trial on the merits* of Goodpasture's *in rem* cause of action against the vessel. After considering deposition testimony, testimony presented at *trial*, and the argument of counsel, the District Court granted a *final judgment* . . ." (Emphasis supplied).

The pertinent portions of Petitioner's brief are attached as Appendix B.

Contrary to the representations contained in its Petition for Writ of Certiorari, Petitioner had notice of the nature

of the June 18 proceedings, because the *trial* was held at Petitioner's own request. Does Petitioner seriously contend, at this late date, that it was denied due process because the District Court granted it the trial it admittedly requested?

C. The District Court intended that the June 18, 1979 proceeding be a trial.

The entries on the District Court's docket sheet substantiate that the June 18 proceeding was a trial. The docket sheet contains the following entries:

6-18-79 (RO) CASE CALLED FOR TRIAL ON PLAINTIFF'S IN REM CLAIM AGAINST THE M/V POLLUX.

6-19-79 (RO) CASE IN TRIAL 2ND DAY BEFORE THE COURT.

D. Petitioner briefed the issue of ownership to the grain in the 1979 appeal.

It is interesting to note that Petitioner briefed and argued the question of ownership of the grain in the 1979 appeal. Until it lost that appeal, it never once complained that it had insufficient notice that ownership was in issue in the June 18 trial.

III. THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY APPLIED THE LAW OF THE CASE DOCTRINE TO ALL PROCEEDINGS AFTER THE COURT OF APPEALS' SEPTEMBER 1979 DECISION.

Petitioner candidly admits that application of the law of the case doctrine was proper if the District Court's

June 28, 1979 Final Judgment is indeed a final judgment. *United States of America v. United States Smelting, Refining, and Mining Company*, 339 U.S. 186, 70 S.Ct. 537, 94 L.Ed. 750 (1950).

Respondent has quoted passages from Petitioner's brief in the Court of Appeals which clearly establish Petitioner's knowledge that the June 18 proceeding was a trial, held at Petitioner's request, and that the resulting judgment was a final judgment. The 1979 appeal was from that final judgment. Yet Petitioner now argues that the trial was not really a trial and that the appeal was merely interlocutory. Nothing in the record lends any support to that argument.

The United States Courts of Appeals hear appeals only from final decisions, with a few limited exceptions. *Cobbledick v. U.S.*, 309 U.S. 323, 760 S.Ct. 540, 84 L.Ed. 7831 (1940); *Andrews v. U.S.*, 373 U.S. 334, 83 S.Ct. 1236, 10 L.Ed.2d 383 (1963). This policy is incorporated in 28 U.S.C. § 1291 which grants the Courts of Appeals "jurisdiction of all appeals from all final decisions of the district courts . . ." Interlocutory appeals lie only under the "collateral orders" doctrine, not applicable here, or under 28 U.S.C. § 1292. 1292(a), by its own terms, is inapplicable to this controversy. § 1292(b) authorizes an interlocutory appeal only when the district court certifies that an interlocutory order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. If the trial judge makes the necessary certificate the Court of Appeals may, in its discretion, hear the case.

However, no such certificate was made here. The district court entered a final judgment. The Court of Appeals received and docketed the appeal as one from a final judgment. The Court of Appeals rendered its decision, and no petition for writ of certiorari was filed within the time allowed by law. The opinion of the Court of Appeals was therefore properly treated as the law of the case.

CONCLUSION

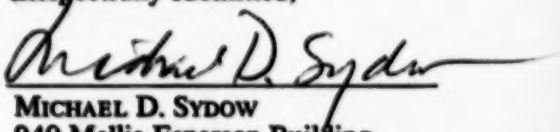
Petitioner cannot obtain review of alleged defects in the Court of Appeals' 1979 decision because it did not petition for writ of certiorari within ninety days from the date mandate was issued in that appeal. Petitioner cannot obtain review of alleged due process violations in the June 1979 district court proceedings because it did not timely appeal those alleged violations to the Court of Appeals. Having failed to present them to the Court of Appeals, Petitioner may not raise them for the first time in this Court.

Petitioner's contention that it did not realize that the issue of ownership of the grain was being tried on June 18, 1979, is contradicted by Petitioner's own written representations to the Court of Appeals.

Petitioner's contention that the 1979 appeal was merely interlocutory is completely rebutted by the record in this case.

For the foregoing reasons, Respondent Goodpasture, Inc. respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,



MICHAEL D. SYDOW
940 Mellie Esperson Building
Houston, Texas 77002
(713) 225-0905

Attorney for Respondent Goodpasture, Inc.

Of Counsel:

EASTHAM, WATSON, DALE & FORNEY

PROOF OF SERVICE

I, Michael D. Sydow, a member of the Bar of this Court, do hereby certify that three true and correct copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari have been served on each party separately represented in this proceeding by depositing the same in a United States post office with first-class postage prepaid, certified, return receipt requested, on this 11 day of March, 1983, addressed as follows:

E. D. Vickery
Kenneth D. Kuykendall
Royston, Rayzor, Vickery & Williams
2200 Texas Commerce Tower
Houston, Texas 77002

Michael D. Sydow

MICHAEL D. SYDOW

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. H-79-770

GOODPASTURE, INC.,
Plaintiff

v.

M/V POLLUX, Her Engines, Her Tackle, Her Apparel, Etc., *in rem*, NEGOCIOS DE MAR S.A., and EMPAC GRAIN CO., Her Owners, Operators, Managers and/or Charterers, *in personam*,
Defendants

DEFENDANT NEGOCIOS DE MAR, S.A.'S MOTION TO LIFT ARREST OF M/V POLLUX

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant and Claimant of the M/V POLLUX, Negocios De Mar, S.A., pursuant to the Federal Rules of Civil Procedure, and moves this Honorable Court to lift the arrest of the M/V POLLUX, and in support thereof would respectfully show as follows:

I.

Plaintiff, Goodpasture, Inc., arrested the M/V POLLUX pursuant to its Original Complaint on April 13, 1979. Plaintiff alleges that the M/V POLLUX was liable *in rem* because Plaintiff delivered aboard the vessel a cargo of wheat and Defendant Claimant refused to issue

a bill of lading in the form demanded by Plaintiff i.e. "Freight Prepaid". Plaintiff also alleges Defendant-Claimant converted the cargo of wheat subsequent to its delivery onboard the M/V POLLUX. Subsequently, on April 25, 1979, Plaintiff filed its First Amended Complaint and added Empac Grain Co. as a Defendant, but Plaintiff did not change its allegations against Defendant-Claimant.

II.

Plaintiff Goodpasture, Inc. by and through its subsidiary, Goodpasture Export Corporation, entered into a contract with Empac Grain Company for the sale of wheat. A copy of the Confirmation of Sale contract is attached hereto and marked "Exhibit A". The contract reveals that title to the cargo of wheat passed from Plaintiff to Empac Grain Company "exspout" or at the time the cargo left the spout of the grain elevator. Empac became the owner of the goods at the time the cargo was loaded onto the M/V POLLUX. Consequently, Plaintiff has no right to maintain an action for conversation against Defendants because only the owner of goods may maintain an action for their conversion.

III.

Defendant-Claimant entered into a Charter Party with Empac Grain Company for carriage of certain grain cargo from Houston to Buenasventura. A copy of the New York Time Charter Party dated March 20, 1979, at Riverside, Connecticut is attached hereto as "Exhibit B". The terms of the Charter Party specify that Empac Grain Company should pay charter hire at the rate of $7,550.00 per day for 24 days in advance and then pay

such charter hire due on a day to day basis. (Clause 4 and 5) The Charter Party also requires Empac Grain Company to pay for bunkers in advance of the voyage. (Clause 48).

IV.

Grain Cargo was loaded onboard the M/V POLLUX on April 11, and 13, 1979. After the cargo had been loaded on April 12, 1979, the Master of the M/V POLLUX was presented a Bill of Lading containing the clause "Freight Prepaid". The Master refused to execute the Bill of Lading which incorporated the "Freight Prepaid" clause because charter hire had not been paid in accordance with the Charter Party. A copy of the Bill of Lading is attached hereto as "Exhibit C", and the Bill of Lading contains the clause "all terms, conditions and exceptions as per charter party." The Bill of Lading establishes that Empac Grain Company was the shipper of the cargo. Accordingly, Plaintiff has no right to demand the issuance of a Bill of Lading, and Defendant-Claimant had no obligation to issue a Bill of Lading to Plaintiff. Defendant-Claimant would further show that it agreed to provide a Bill of Lading to the shipper (Empac) covering the cargo of wheat bill but it would not execute a "Freight Prepaid" bill until the freight had been paid.

V.

Defendant-Claimant would respectfully show that the attached documentation establishes that Plaintiff Goodpasture, Inc. is not the owner of the cargo onboard the vessel, and it is not entitled to maintain a cause of action for conversation. Cargo was sold by Goodpasture to Empac and the risk of loss passed at the time the cargo

left the spout of the Goodpasture elevator. *Consolidated Bottling Co. v. Jaco Equipment Corp.*, 442 F.2d 660, 662-63 (2d Cir. 1971); *Larry Lightner, Inc. v. United States*, 213 F.2d 449, 451 (5th Cir. 1954); *A. C. Rent-A-Car, Inc. v. American National Bank & Trust Co.*, 339 F.Supp. 506, 512 (S.D. Ala. 1972), *aff'd per curiam*, 477 F.2d 564 (5th Cir. 1973); *Minex v. International Trading Co.*, 303 F.Supp. 205, 208 (E.D. Va. 1969); *Jackson v. Baldwin-Lima-Hamilton Corp.*, 252 F.Supp. 529, 536 (E.D. Pa.), *cert. denied*, 385 U.S. 803 (1966); *Ehrenberg v. Guerrero*, 225 S.W. 86, 88 (Tex. Civ. App.—El Paso 1920, no writ). Empac was the shipper and charterer of the vessel, and it was entitled to the issuance of the "Freight Prepaid" Bill of Lading as soon as it had paid charter hire and for bunkers in accordance with clauses 4, 5 and 48 of the Charter Party. Goodpasture, Inc. was not the owner or shipper of the cargo, and it does not have any standing to sue for conversion of the cargo or for failure of the vessel owner to issue a Bill of Lading. See *Bankers Life Insurance Co. v. Scurlock Oil Co.*, 447 F.2d 997, 1004 (5th Cir. 1971); *Guinn v. Lokey*, 249 S.W.2d 185, 186 (Tex. 1952).

VI.

Plaintiff Goodpasture, Inc. also alleges that it is entitled to seize the M/V POLLUX because Defendant-Claimant refused to issue a bill of lading for the cargo of wheat with the notation "Freight Prepaid" even though freight (charter hire) had not been paid. Nevertheless, the issuance of a bill of lading marked "freight prepaid" would extinguish Defendant's lien on the cargo for charter hire as to a third party holder of the bill of lading who acquired the bill without notice of such lien for charter hire.

Beverly Hills National Bank & Trust Co. v. Compania de Navegacione Almirante S.A., Panama, 437 F.2d 301 (9th Cir.), *cert. denied,* 402 U.S. 996 (1971). In addition, the issuance of the "Freight Prepaid" bill of lading without payment of freight would be a violation of the United States law, and such act could form the basis of a cause of action against Defendant-Claimant for fraud 49 U.S.C. § 121. See *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.i,* 155 F. Supp. 886 (D.C.N.Y. 1957) aff'd 265 F.2d 418 (2nd Cir. 1959). Also the United States Courts would refuse to determine the rights of the respective parties who had entered into the agreement in violation of 49 U.S.C. § 121. See: In the Matter of the Arbitration between Metal Transport Corporation and Compania Natural Naviera, 268 F.Supp. 456 (S.D. N.Y. 1965).

WHEREFORE, PREMISES CONSIDERED, Defendant Negocios De Mar, S.A. respectfully moves that the arrest of the M/V POLLUX be lifted and that Defendants have such other and further relief to which they may be justly entitled.

Respectfully submtited,

/s/ KENNETH D. KUYKENDALL
Kenneth D. Kuykendall
Attorney in Charge for Defendant
Negocios De Mar, S.A.
3710 One Shell Plaza
Houston, Texas 77002
713/224-8380

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

CERTIFICATE OF SERVICE

I certify that on this the 21st day of May, 1979, a copy of the foregoing Motion was Hand Delivered to the attorneys for Plaintiff, Eastham, Watson, Dale & Forney, 947 Mellie Esperson Building, 804 Travis Street, Houston, Texas 77002 and Clann & Pearson, First City National Bank Building, Houston, Texas 77002.

/s/ KENNETH D. KUYKENDALL
Of Royston, Rayzor, Vickery
& Williams

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-2507

GOODPASTURE, INC.,
Appellant/Cross-Appellee

v.

M/V POLLUX, Appellee/Cross-Appellant
EMPAC GRAIN CO., Appellee and
NEGOCIOS DEL MAR, S.A., Appellee/Cross Appellant

NEGOCIOS DEL MAR, S.A., Appellee

v.

A SHIPMENT OF WHEAT OF 19,067.949 METRIC TONS PRESENTLY ONBOARD THE M/V POLLUX,
and
EMPAC GRAIN CO. and GOODPASTURE, INC.
Appellees

BRIEF OF APPELLEES/CROSS-APPELLANTS,
NEGOCIOS DEL MAR, S.A. AND
THE M/V POLLUX

---

* * *

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS BELOW

* * *

The Shipowner moved for and was granted a trial on the merits of Goodpasture's *in rem* cause of action against the Vessel. After considering deposition testimony, testimony presented at trial, and the argument of counsel, the District Court granted a final judgment dismissing Goodpasture's Second Amended Original Complaint as to the Vessel, lifting the seizure of the Vessel and releasing the Vessel from arrest. (Record Excerpts 2 and 3) The District Court correctly concluded that Goodpasture had no *in rem* right against the Vessel, and that the seizure of the Vessel was illegal. However, upon Goodpasture's Motion, the Court entered an Order Granting Stay of the release of the Vessel pending Goodpasture's prosecution of an expedited appeal. (Record Excerpts 4)

* * *

NO. 82-1398

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

M/V POLLUX, Her Engines, Tackle, Apparel, Etc., *In Rem* and NEGOCIOS DEL MAR, S.A.,
Petitioner

v.

GOODPASTURE, INC.,
Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

E. D. VICKERY
KENNETH D. KUYKENDALL
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Of Counsel:

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SUBJECT INDEX

LIST OF AUTHORITIES

NO. 82-1398

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

M/V POLLUX, Her Engines, Tackle, Apparel, Etc., *In Rem* and NEGOCIOS DEL MAR, S.A.,
Petitioner

v.

GOODPASTURE, INC.,
Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Now comes Petitioner and files this Reply to the Brief in Opposition to Petition for Writ of Certiorari filed by Respondent Goodpasture, Inc., and Petitioner would respectfully show that the Petition for Writ of Certiorari should be granted.

ARGUMENT

Numerous statements in Goodpasture's Brief in Opposition to the Petition for Writ of Certiorari are legally and factually inaccurate, and Petitioner will point out these inaccuracies in detail hereinafter. However, *if* the assertions made by Goodpasture in the Statement of the Case are accepted and read in light of the decision of the Court of Appeals for the Fifth Circuit dated September 10, 1979, Goodpasture's Brief itself establishes that Petitioner was denied constitutional process.

GOODPASTURE'S BRIEF DEMONSTRATES PETITIONER NOT ACCORDED DUE PROCESS

Petitioner refers to Goodpasture's version of the facts on page 2 of its Brief, as follows:

> "Petition also moved to dismiss Goodpasture's suit and to lift the arrest of the POLLUX alleging that Goodpasture was not the owner of the grain. Petitioner requested and was granted a hearing on its motion to dismiss. The hearing was held on May 30, 1979. *At that hearing, both Petitioner and Respondent agreed that Petitioner's claims against the wheat were not in issue, but only Goodpasture's ownership of the cargo.* The Court then, at Petitioner's urging, set the case for trial to determine the ownership of the grain and Respondent's right to maintain the arrest of the POLLUX." (Emphasis supplied)

Petitioner strongly denies it made a request for a trial on the merits, and the transcript of the proceedings on May 30 and June 18, 1979, clearly demonstrate that the Judge granted Petitioner a post-seizure hearing to satisfy constitutional due process. Nevertheless, the statement that "Petitioner and Respondent agree that Petitioner's claims against the wheat were not in issue" at the time of the hearings on May 30 and June 18, 1979 is obviously correct; and this was the reason the District Court refused to allow Petitioner to introduce any evidence to support its *in rem* claim against the wheat cargo. However, the basis of the decision of the Court of Appeals dated September 10, 1979, was that the M/V POLLUX had converted such wheat cargo by asserting a maritime lien against the cargo, as follows:

> It remains to consider whether the seizure of Goodpasture's wheat by Negocios as security for its claims against Empac was a maritime tort giving rise to an *in rem* claim in Goodpasture against the POLLUX. . . . Our situation here is less aggravated, for POLLUX did not sail but merely asserted a claim in the nature of a maritime lien against the wheat. . . . We think these actions by Negocios were sufficiently at variance with the right to possession of the wheat by its owner, Goodpasture, to constitute conversion. . . ." (Opinion of Fifth Circuit dated September 10, 1979, Appendix H, pp. 30a and 31a).

The decisions of this Court clearly hold that the Fifth Circuit could not constitutionally determine Petitioner converted the cargo by asserting a maritime lien on such cargo when that issue had been removed from consideration of the District Court by agreement of the parties. *Armstrong v. Manzo*, 380 U.S. 545, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965); *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970). Furthermore, even if the lack of due process were not in issue, the Court of Appeals could still not reverse the decision of the District Court on a basis not presented to the District Court.

GOODPASTURE'S REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI ARE LEGALLY UNSUPPORTABLE

Respondent Goodpasture, Inc. urges that the Supreme Court deny the Petition for Writ of Certiorari because (1) the Petition for Writ of Certiorari was not timely filed; (2) Petitioner was not denied due process in the June 18, 1979, proceeding; and (3) the District Court and the Court of Appeals properly applied the law of the case doctrine to all proceedings after the Court of Appeals' September, 1979 decision. Petitioner will discuss contentions (1) and (3) together and contention (2) separately to reveal the lack of any basis in the evidence or legal authorities to support such positions.

1. The Petition for Writ of Certiorari was timely filed, and the decision of the Court of Appeals does not bind this Court under the law of the case doctrine.

Respondent takes the position that since the Petition for Writ of Certiorari was not filed within ninety days of the decision of the Court of Appeals denying the Motion for Rehearing on October 26, 1979, then the decision of the Court of Appeals dated September 10, 1979, is binding on the Court as the law of the case. Obviously, since

the hearing of June 18, 1979, was a post-seizure hearing in accordance with constitutional due process, the reversal and remand of the case to the District Court should have been for a trial on the merits; and this appeal seeks to correct the error of the District Court and Court of Appeals in refusing Petitioner a trial on the merits. In fact, the District Court initially ruled on September 17, 1979, after remand from the Fifth Circuit, that the case would proceed to trial on the merits. Subsequently, the District Court changed its ruling on December 6, 1979, and ordered the case be set for a hearing on Show Cause Why Judgment Should Not Be Entered in Favor of Goodpasture on the basis of the Fifth Circuit's decision. On February 27, 1980, the District Court refused to set the case for a trial on the merits and heard evidence on the Show Cause hearing. Finally, the District Court's Memorandum and Order dated June 11, 1980, determined that it was bound by the previous decision of the Fifth Circuit concerning liability. Hence, this appeal from the decision of the District Court dated June 11, 1980, which was affirmed by the Court of Appeals on October 12, 1982, is obviously timely.

In addition, *if* the Court assumes that Respondent's position is correct in labeling the hearing on June 18, 1979, a trial on liability, this appeal is still timely because (1) the Fifth Circuit decision was remanded for "further proceedings",[1] and (2) the decision did not resolve the damage issues.[2] Although the decision of the District

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1. "For the reasons to be stated in an opinion which we shall shortly hand down, the order of the District Court dismissing the second amended complaint of Goodpasture, Inc. as to the M/V POLLUX, lifting the seizure of it, and releasing it from arrest is reversed and the cause is remanded for further proceedings." (Order of the Fifth Circuit dated August 13, 1979, Appendix G, p. 22a)

2. *See*, Restatement of Judgment, Second (1980) § 13 comment b, p. 133, as follows:

"Finality will be lacking . . . if the amount of damages . . . remains to be determined."

Court did not meet the finality requirement under 28 U.S.C. § 1291,[3] Goodpasture's appeal was proper under 28 U.S.C. § 1292(a)(3).[4] In fact, Respondent's attorney adopted this position on September 17, 1979, after remand from the Fifth Circuit, to support Goodpasture's argument of a trial on the merits, as follows:

> MR. SYDOW (Goodpasture's attorney): There is such things as bifurcated trials on liability and damages which is what, in effect, we have had here." (Petition for Writ of Certiorari, Appendix I, p. 32a.)

Therefore, even though 28 U.S.C. § 1292(a)(3) would have allowed Petitioner to file a Petition for Writ of Certiorari, such right was permissive and not mandatory; and Petitioner could await the determination of the additional liability and damage issues. *United States of America v. United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 70 S.Ct. 537, 94 L.Ed. 750 (1950); *Cardelis v. Refineria Panama, S.A.*, 384 F.2d 589 (5th Cir. 1967).

Respondent's Brief refuses to acknowledge the clear ruling of this Court that the decision of the Court of Appeals does not bind this Court under the law of the case doctrine. *Messinger v. Anderson*, 225 U.S. 436, 32 S.Ct. 739, 56 L.Ed. 1152 (1912). *United States of America v. United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 70 S.Ct. 537, 94 L.Ed. 750 (1950) demonstrates the non-binding effect of the law of the case doctrine is an analogous situation, as follows:

---

3. "Finality" under Rule 54(b) is generally understood as that degree of finality required to meet the appealability requirement of 28 U.S.C. § 1291. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437, 76 S.Ct. 895, 100 L.Ed. 1297 (1965). This, in turn, is defined as a judgment "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 S.Ct. 911 (1945).

4. "The courts of appeal shall have jurisdiction of appeals from: . . . (3) interlocutory decrees of such district courts or the judges thereof determining the rights and liability of the parties to admiralty cases in which appeals from final decrees are allowed; . . ."

"The rule of law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, it should be the end of the matter. . . . It is not applicable here because when the case was first remanded, nothing was finally decided. The whole proceeding thereafter was in fieri. The Commission had a right on reconsideration to make a new record. . . . When finally decided, all questions were still open and could be presented. The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because temporary injunction had been granted in order to maintain the status quo. This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable. 28 USCA § 1253, FCA title 28, § 1253. The appellants might have appealed, but they were not bound to. We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of res judicata. . . . And although the latter is a uniform rule, the 'law of the case' is only a discretionary rule of practice. It is not controlling here. . . ." 94 L.Ed. at 760, 761.

In *United States v. United States Smelting R. & M. Co., supra,* the Interstate Commerce Commission enjoined carriers from performing switching and spotting services in certain industrial plants, but a three judge District Court held the order unlawful and remanded the case to the Interstate Commerce Commission; and an appeal to the Supreme Court was not taken from the decision of the three judge court. On remand, the Commission did not take any further evidence, but it again entered a cease and desist order against the carrier; and the District Court again held the order unlawful. On appeal to this Court, Respondent argued that the law of the case had been established by the previous decision of the three judge Court, but this Court held that the law of the case was not applicable to the order of the three judge District Court.

2. Petitioner was denied due process in the June 18, 1979 hearing.

Respondent's Brief alleges that Petitioner was not denied due process because (1) the District Court intended the hearing on June 18, 1979, to be a trial on the merits; (2) Petitioner judicially admitted that it knew the hearing on June 18, 1979 was a trial on the merits; and (3) it put ownership of the cargo in issue at the time of the hearing on June 18, 1979.[5] First, *Petitioner categorically denies the allegation that the District Court intended the June 18, 1979, hearing to be a trial on the merits; and Petitioner calls this Court's attention to the fact that Respondent has conscientiously avoided reference to the numerous rulings of the District Court regarding the hearing on June 18, 1979.* Reference to only a few such comments in the Appendixes to the Petition for Writ of Certiorari will clearly demonstrate the District Court's views as follows:

1. THE COURT: What I'm doing, I imagine, is giving him his due process claims as to whether or not this arrest of the vessel is done without due process of law, as a deprivation of property without due proc-

5. The hearing of June 18, 1979, was concerned only with the legal issue of whether Petitioner had converted the cargo by refusing to issue a freight prepaid bill of lading without receiving payment of the charter hire. The issue of ownership of the wheat was important because the owner of the wheat would be entitled to the bill of lading. The bill of lading showed Empac was the shipper, i.e., owner of the cargo. Goodpasture produced the Confirmation of Sale contract regarding the sale of the grain to Empac. This contract passed title to the grain cargo to Empac by operation of law under the Texas Uniform Commercial Code. *Mahon v. Stowers*, 416 U.S. 100, 40 L.Ed.2d 79, 94 S.Ct. 1626 (1974), *on remand, In the Matter of Samuels & Co., Inc.*, 510 F.2d 139 (5th Cir. 1975), *reh. en banc*, 526 F.2d 1238 (5th Cir. 1976); *T. J. Stevenson & Co., Inc. v. 81,193 Bags of Flour*, 629 F.2d 338 (5th Cir. 1980). Nevertheless, at the time of the hearing on June 18, 1979, Goodpasture repudiated the contract, and its witnesses testified that the contract had been voided and replaced by an oral agreement between Empac and Goodpasture whereby title to the grain cargo did not pass until Goodpasture had been paid under the letter of credit.

ess of law. In trying to satisfy the due process requirements by having this hearing at this time." (Hearing, May 30, 1979, Appendix B, p. 3a).

2. "THE COURT: Goodpasture, Inc. versus the M/V POLLUX, her engines, tackle, apparel, et cetera, Empac Grain Company and Negocios Del Mar, S.A., her owners and/or operators, civil action number H-79-770. This is a motion to have a hearing as to the matter of the arrest of the ship and the question as to whether or not the ship should be released from arrest or sold pursuant to the arrest. Are you ready to go forward?

   MR. SYDOW (Goodpasture's attorney): Ready, Your Honor.

   MR. KUYKENDALL (Negocios' attorney): Defendant is ready, Your Honor.

   MR. PEARSON (Empac's attorney): Empac is ready, Your Honor.

   THE COURT: All right, you may proceed." (Hearing June 18, 1979, Appendix C, p. 8a)

3. "Briefs were filed by the parties and a hearing was conducted on June 1, 1979 (May 30, 1979). After reviewing the issue and being of the opinion that a further evidentiary hearing concerning Plaintiff's *in rem* against the vessel was necessary in order for the Court to rule upon Negocios' Motion to Lift the Arrest of the vessel a hearing was set for June 18, 1979, for the purpose of taking evidence and hearing arguments concerning Plaintiff's *in rem* claim against the vessel." (District Court's Memorandum and Order dated June 11, 1980, Appendix K, p. 45a)

Second, *Petitioner did not judicially admit it knew the trial of June 18, 1979, was a trial on the merits.* Respondent cites from a Brief filed by Petitioner on June 30, 1979, in which Petitioner referred to the hearing as a "trial on the merits of Goodpasture's *in rem* cause of action against the vessel." Petitioner has previously admitted that this was merely a mistake in terminoligy, and it was caused by the absence of the attorney in charge of the case dur-

ing the week of June 26, 1979; and this required another attorney to prepare this brief in support of an expedited appeal.

Petitioner filed an Emergency Motion to Lift District Court's Order Staying Release of the M/V POLLUX from Seizure and Motion for Expedited Appeal from that Order, and this Motion was reviewed by the attorney in charge on Saturday, June 23, 1979, prior to departing the United States for depositions; and this Motion was filed in the Court of Appeals on June 26, 1979. This Emergency Motion clearly represents the fact that the hearing of June 18, 1979, was an "evidentiary hearing."[6]

The matter of the emergency appeal was discussed with the Court of Appeals (Judge Gee) by telephone on June 29, 1979, and a letter dated June 30, 1979, forwarded all pleadings, briefs, depositions, exhibits, and transcript of the evidence to the emergency panel composed of Honorable Judges Gee, Hill, and Clark at their respective "home bases." An oral hearing was held in the chambers of Honorable Judge Thomas Gibbs Gee in Austin, Texas, on July 3, 1979. Judge Gee set the expedited appeal for argument on July 17, 1979, and the Fifth Circuit established a briefing schedule in its letter dated July 3, 1979.[7] At the time of the oral argument on July 17, 1979, the Fifth Circuit considered the briefs filed by Goodpasture, Empac and Negocios; and the briefs of the parties accurately characterized the proceeding on June 18, 1979, as an evidentiary hearing and not a trial on the merits, as follows:[8]

> Brief of Appellant/Cross Appellee Goodpasture, Inc. filed July 10, 1979.

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6. The pertinent portion of the Emergency Motion is reproduced in Appendix "A".

7. A copy of the letter is attached as Appendix "B".

8. The pertinent portions of the briefs filed by Petitioner and Empac Grain Co., Inc., on July 16, 1979, are reproduced in Appendix "A".

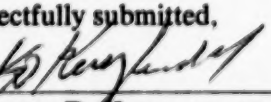
> "On May 29, 1979, Negocios Del Mar filed a Motion to Lift Arrest of the POLLUX and requested an immediate post-seizure hearing. *On May 30, 1979, the District Court heard arguments on Negocios Del Mar's Motion. At that time, the Court continued the arrest of the POLLUX and set Negocios Del Mar's Motion to Lift Arrest for an evidentiary hearing on June 18, 1979.*" (p. 3) (Emphasis supplied)

In conclusion, Goodpasture's contention that Petitioner knew that the hearing of June 18, 1979, was a trial on the merits is a gross misrepresentation and clearly contradicted by Goodpasture's own representations to the United States Court of Appeals for the Fifth Circuit on July 16, 1979, the day prior to oral argument of this case in the initial appeal. Also, Goodpasture's contention that the District Court intended the hearing of June 18, 1979, to be a trial on the merits because of the entries on the Docket Sheet is likewise unsupportable; and this can be easily demonstrated by the rulings of the District Court, which are cited verbatim on pages 7 and 8 of this brief.

CONCLUSION

The Petition for Writ of Certiorari should be granted to require the revision of Rule C to provide a prompt post-seizure evidentiary hearing in accordance with constitutional due process which cannot be changed into a trial on the merits.

Respectfully submitted,



KENNETH D. KUYKENDALL
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Houston, Texas 77002
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CERTIFICATE OF SERVICE

This is to certify that three copies of this Reply Brief have been served on all parties required to be served, i.e., on Respondent by placing the same in an envlope and depositing it in the United States mail, with first class postage prepaid, addressed to counsel of record in accordance with Rule 28.3 as follows: Michael Sydow, Esq., Eastham, Watson, Dale & Forney, Mellie Esperson Building, Houston, Texas 77002, on this FOURTH day of ~~March~~ April, 1983.

OF ROYSTON, RAYZOR, VICKERY & WILLIAM:

APPENDIX "A"

PERTINENT PORTIONS OF BRIEFS IN FIFTH CIRCUIT SHOWING JUNE 18, 1979 HEARING WAS NOT A TRIAL ON MERITS

1. Emergency Motion to Lift District Court's Order Staying Release of the M/V POLLUX from Seizure and Motion for Expedited Appeal from that Order filed June 26, 1979.

   "Finally, *after an evidentiary hearing on June 18 and 19, 1979,* the District Court held that Goodpasture had no *in rem* right against the vessel and instructed the United States Marshal to release the vessel. Neverless, Goodpasture immediately sought and obtained from the Court an indefinite stay of the order releasing the vessel pending action to be taken by Goodpasture to prosecute an expedited appeal. Hence, the purpose of this Motion is to obtain an expedited appeal of this case as soon as possible in order to lift the Stay Order entered by the District Court on June 22, 1979, and to allow the release of the M/V POLLUX from seizure." (Emphasis supplied)

2. Brief of Appellee Empac Grain Corporation, dated July 16, 1979.

   "On May 29, 1979, Shipowner filed a Motion to Lift Arrest of the Vessel and requested an immediate hearing. *The Shipowner's Motion came on for hearing before the District Court on May 30, 1979, and at that time an evidentiary hearing was scheduled for June 18, 1979, to ascertain whether Goodpasture had stated a cause of action in rem against the vessel. The evidentiary hearing was held as scheduled on June 18 and 19, 1979.* On June 20, 1979, the District Court entered its Findings of Fact and Conclusions of Law relative to Goodpasture's *in rem* cause of action only and concluded that the Shipowner's refusal to sign the freight prepaid bills of lading did not constitute a conversion of Goodpasture's wheat, and that Shipowner was

under no statutory or contractual obligation to issue bills of lading in any form to Goodpasture; and that Goodpasture had no *in rem* right against the vessel. The District Court ordered Goodpasture's Complaint dismissed on the Vessel and ordered the seizure lifted on June 20, 1979." (p. 2) (Emphasis supplied)

3. Reply Brief of Appellee/Cross Appellant Negocios Del Mar, S.A. filed July 16, 1979.

"*A hearing was held before the Court on June 18, 1979*, and the District Court held that Goodpasture, Inc. did not have a maritime lien against the M/V POLLUX. The issue of whether or not Negocios Del Mar, S.A. had a maritime lien against the cargo was not litigated because Goodpasture, Inc. posted the required bond to provide security for the claim of Negocios Del Mar, S.A. in accordance with the Admiralty Supplemental Rules." (p. 4) (Emphasis supplied)

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

July 3, 1979

Mr. Michael D. Sydow
Attorney at Law
947 Mellie Esperson Bldg.
Houston, Texas 77002

Mr. E. D. Vickery
Attorney at Law
3710 One Shell Plaza
Houston, Texas 77002

No. 79-2507 — Goodpasture, Inc. vs. M/V Pollux, Etc., Et Al; Negocios Del Mar, S.A., Etc.

Gentlemen:

This will confirm that the Court has ordered the appeal on its merits expedited for hearing at Houston, Texas on Tuesday, July 17, 1979.

This will also confirm that Mr. Sydow will deliver to Mr. Vickery his brief on the merits by the close of business on Tuesday, July 10, 1979 in order to permit a response by appellees as promptly as possible thereafter, and by not later than Monday, July 16, 1979.

Counsel should contact our Clerk's Office in Room 11621 11th Floor, U.S. Courthouse, 515 Rusk Avenue by the date of hearing to advise the names of counsel to present argument. The Clerk's Office telphone No. is 226-4753.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By: GILBERT F. GANUCHEAU
Gilbert F. Ganucheau
Chief Deputy Clerk

GFG:gc
cc: Mr. John R. Pearson